In the

Supreme Court of the United States

October Term, 1947

No. 196

HERBERT SCHNEIDER,
Appellant,

v.

WILLARD J. SMITH, Commandant,
UNITED STATES COAST GUARD,
Appellee.

BRIEF OF APPELLANT

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BRIEF OF APPELLANT

OPINION BELOW

The opinion of the district court is reported in 263 Fed. Supp. 496 (1967). It is set forth in the Joint Appendix to the Briefs, beginning at page J.A. 36.[1]

JURISDICTION

This is an appeal under 28 U.S.C. §1253 from the judgment of a three-judge federal district court, convened under the provisions of 28 U.S.C. §2282; on 23

1. In conformance with Rule 36, ¶2, the parties have agreed on the printing of certain portions of the record below, which is printed separately as the "Joint Appendix to the Briefs," which is referred to in this brief as "J.A.," followed by appropriate page number or numbers.

The statutory material required by Rule 40, ¶1(c), to be printed in an appendix is appended to this brief, with separate pagination, and is referred to as "A," followed by appropriate page number or numbers.

January 1967, the three-judge court dismissed the complaint of appellant seeking an injunction against the enforcement of the Magnuson Act, 50 U.S.C. §191, and executive orders and regulations issued thereunder, for repugnance to the constitution.

Notice of appeal from the order of dismissal was filed and served on 17 March 1967. As authorized by former U. S. Supreme Court Rule 13, §1, before the expiration of the 60-day period for docketing this appeal, the Hon. William J. Lindberg, a member of the three-judge district court, granted an order enlarging the time for docketing this appeal to and including 26 May 1967. Appellant filed and served a jurisdictional statement, and this appeal was docketed on 26 May 1967.

CONSTITUTIONAL PROVISIONS, STATUTES, EXECUTIVE ORDERS, AND REGULATIONS

The constitutional provisions here involved are Article I, §9, Clause 3, and Amendments 1, 5, and 6.

The statute involved is the Magnuson Act, 50 U.S.C. §191, 40 Stat. 220, 64 Stat. 427, 64 Stat. 1038.

The Executive Orders are E.O. 10173, E.O. 10277, and E.O. 10352, (3 C.F.R. 356-359; 3 C.F.R. 778-780; 3 C.F.R. 872; 15 F.R. 7005, 16 F.R. 7537, 17 F.R. 4607).

The regulations appear in 33 C.F.R. part 6, and 33 C.F.R. part 121.

All of these provisions are set out in the appendix to this brief, pp. A-1 to A-21.

QUESTIONS PRESENTED FOR REVIEW

1

Is the Magnuson Act unconstitutionally vague, on its face, and as applied, because it includes in its prohibitory sweep, through use of imprecise, undefined terms such as "subversive activities" and "subversive acts . . . or other similar causes," not only deliberate criminal acts properly subject to regulation, but also constitutionally protected exercise of political association, belief, and speech without adequate warning as to what uses of such First Amendment rights are in fact forbidden?

2

Does the Magnuson Act as applied through the Coast Guard regulations deny due process of law to seamen by requiring them to bear the burden of proving to the Coast Guard's satisfaction that their exercise of First Amendment rights of speech, association and activities on behalf of the press is free from unlawful taint?

3

Do the Coast Guard regulations under the Magnuson Act deny due process of law by failing to provide a hearing procedure that permits confrontation and cross-examination of adverse witnesses, and if so, must appellant submit himself to this procedure in order to object to its unconstitutionality?

4

May the Coast Guard deny appellant the right to seek employment as a marine engineer by insisting that before his application for specially validated shipping papers is processed he waive rights protected under the First and Fifth Amendments and answer broad, vague inquiries

about his political beliefs, associations, and activities on behalf of the press?

5

Do the Magnuson Act and the screening program administered under it have a constitutionally prohibited "chilling effect" upon the exercise of First Amendment rights?

6

If the Magnuson Act authorizes the use of the Attorney General's list of subversive organizations as one of the criteria for determining the acceptability of seamen for maritime employment, is the act as so applied a bill of attainder or *ex post facto* law?

7

If the Magnuson Act authorizes the screening program administered under it, does it deny due process of law to seamen by creating a factually unsupported assumption that the political associations and beliefs of an individual permit an accurate assessment of the likelihood that he will engage in acts of sabotage?

8

Does the Act unconstitutionally delegate to the executive branch of government the legislative power to create the screening program administered by the Coast Guard?

9

Can an intent on the part of Congress to authorize the screening program administered by the Coast Guard be found either in the statutory language of the Act itself or in the Congressional history of the Act?

STATEMENT OF THE CASE

Appellant is a qualified and licensed marine engineer who sailed on United States merchant vessels as a merchant seaman in various capacities between 1942 and 1949 (J.A. 10). Since 1949 he has engaged in non-maritime employment (J.A. 10). In October 1964 he secured the renewal of his license as a second assistant marine engineer, originally issued to him in 1945, and he applied to the United States Coast Guard office in Seattle, Washington for renewal and validation of his merchant mariner's documents first issued to him in 1940 (J.A. 10). Regulations of the United States Coast Guard issued under the claimed authority of the Magnuson Act, 50 U.S.C. §191, provide that "All licensed officers and certificated men who are employed on merchant vessels of the United States" of over 100 gross tons "must be holders of special validated documents prescribed by the Commandant." (33 C.F.R. §610-3, p. A-8, and 33 C.F.R. §121.01(a), p. A-11.)

Appellant applied to the Coast Guard for the required special validation of his existing merchant mariner documents.

As a part of this application for this special validation, appellant was required to answer under oath the question "Are you now, or have you ever been, a member of, or affiliated or associated with in any way any of the . . ." approximately 280 organizations named by the Attorney General as "subversive," which organizations were listed in the application (J.A. 27-33). He answered "Yes," (J.A. 27), and added an explanation:

"I have been a member of many political & social

organizations, including several named on this list. I cannot remember the names of most of them & could not be specific about any. To the best of my knowledge I have not been a member or participated in the activities of any of these organizations for ten years." (J.A. 33)

His application was dated and submitted to the Coast Guard on 19 October 1964. On 13 March 1965, he demanded, through his attorney, an explanation for the delay in processing his application and at the same time protested the use of the Attorney General's list as an "unreasonable criteria as a precondition of employment," violative of "constitutional standards" (J.A. 18). A reply from the Coast Guard excused the delay on the ground of appellant's "reluctance to furnish names and dates of his membership in several of the organizations which have been designated by the Attorney General . . . ," but "anticipated that action will be taken in the near future" (J.A. 19). After appellant's counsel had again protested the delay and the use of the Attorney General's list (J.A. 20), the Coast Guard sent him a set of written interrogatories (J.A. 34-36), to be answered under oath, supplemental to the previous application and referring to appellant's statement on that application that he had "been a member of of many . . . organizations, including several named on" the Attorney General's list. The interrogatories asked appellant to:

"(a) List the names of the political and social organizations to which you have belonged, and location.

"(b) Furnish approximate dates of membership.

"(c) Furnish full particulars concerning the extent of your activities and participation in the organiza-

tion (number and type of meetings; functions attended; positions or offices held; classes or schools attended; contributions made; etc.).

"(d) Your reason for discontinuing the membership.

"(e) Your present attitude toward the principles and objectives of the organizations."

The interrogatories also requested answers and a full explanation concerning the following:

"Are you now, or have you ever been, a member of or affiliated with, in any way, the Communist Party, its Subdivisions, Subsidiaries, or Affiliates?

"Have you at any time been a subscriber to the 'People's World'? If your answer is 'Yes,' give dates.

"Have you at any time engaged in any activities in behalf of the 'People's World'? If your answer is 'Yes,' furnish details.

"What is your present attitude toward the Communist Party?

"What is your present attitude toward the principles and objectives of Communism?

"What is your attitude toward the form of Government in the United States?"

The interrogatories were accompanied by a form of oath which includes a warning that "ANY FALSE STATEMENT MAY BE PUNISHABLE UNDER §1001, TITLE 18, UNITED STATES CODE" (J.A. 36). (18 U.S.C. §1001 creates a felony, punishable by up to five years' imprisonment and $10,000 fine.)

The Coast Guard notified appellant by letter dated 23 March 1963:

"No further action will be taken on your application until your reply is received at this Headquarters." (J.A. 34)

Appellant refused to answer these supplemental interrogatories, stating through his attorney that it was because of his "commitment to the Constitution . . . and the Bill of Rights, that he finds the questions so obnoxious" (J.A. 22) and that it was not he "who is subversive . . . but rather . . . those who would insist that a matter of what a person reads or thinks is relevant to their dedication to the freedom principles for which this country stands" (J.A. 23). Appellant declined to risk possible perjury prosecution in answering (J.A. 22-23), the vague questions put to him (pp. 6-7 above) and disclosed through his attorney what "the most superficial investigation would have confirmed" (J.A. 23): i.e., that he had belonged to the Communist Party U.S.A. and other organizations on the Attorney General's list during the decade 1940 to 1950, and had left those groups because of disagreement with their techniques and methods.

No further action was taken by the Coast Guard on appellant's application. Appellee seeks to justify this refusal to process the application by 33 C.F.R. §121.05(c)(2), (p. A-14, below) requiring the Commandant to hold an application "in abeyance" if the applicant fails to answer any question put to him.

After further fruitless correspondence, appellant filed his complaint (docket entry for 23 September 1965, J.A. 1), praying for a declaratory judgment that the Magnuson Act and the Executive Orders and regulations issued under it are unconstitutional, seeking an injunction requiring the Coast Guard to approve his application for a special validation, and enjoining the Coast Guard from

interfering with plaintiff's employment on U.S. flag vessels.[2]

A three-judge court was designated to hear the case on 30 September 1965 (J.A. 1).

The appellee stipulated in the pre-trial order filed on 30 September 1966, that he did not intend to contest at the trial by evidence to the contrary the fact that plaintiff was then and always had been loyal to the United States of America, that he had not been active in any organization on the Attorney General's list in the past 10 years, and had never committed any act of sabotage or espionage or any act inimical to the security of the United States of America, but appellee was "unable to concede" these facts and took the position that they were immaterial (J.A. 14).

The case was tried to the three-judge court on stipulated facts including the exhibits to the pre-trial order and was briefed and argued without further evidence. The issues of law below were essentially those presented here.

SUMMARY OF ARGUMENT

I.

The jurisdiction of this court is properly invoked.

Appellant's complaint below directly challenged the constitutionality of the Magnuson Act on the ground that a statute is fatally vague and overbroad in an area touching First Amendment freedoms (where precision of regulation is constitutionally required) when it purports to

2. In the original complaint, plaintiff prayed for damages, but the pre-trial order provided that "pursuant to stipulation of the parties the damage question is reserved until after the determination of the constitutional questions of law" (J.A. 16).

authorize an administrative regulatory system solely on the basis of an executive finding of a threat to the security of the United States from "subversive activity," and when it further purports to grant the executive unlimited authority to deny seamen the right to follow their calling, in order to safeguard vessels and waterfront facilities from "subversive acts". This is a substantial constitutional challenge under the "doctrine which has emerged" with such cases as *Keyishian v. Board of Regents,* 385 U.S. 589 (1967), and *Baggett v. Bullitt,* 377 U.S. 360 (1964).

Where a substantial constitutional challenge to a statute itself is presented and injunctive relief is sought against its enforcement through the regulations it purports to authorize, a three-judge court must be, and in this case was properly, convened, as required by 28 U.S.C. §2282. Whether or not such a challenge is upheld on appeal, the substantiality of that challenge confers appellate jurisdiction upon this court, which may then pass on all issues of law presented below, including constitutional challenges to the regulations and issues of statutory interpretation, such as those discussed in the following points. *Zemel v. Rusk,* 381 U.S. 1 (1965).

II.

A. The rules and regulations that apply the Magnuson Act create a screening program designed to prevent "subversives" from becoming seamen. The Coast Guard, after determining that a prospective seaman has the necessary skills of his calling, places a further qualification upon his right to pursue his calling: that he obtain from the Coast Guard a special validation of his qualifying papers. Such validation is issued only to those who satisfy the Commandant that their character and habits of life are such

that their presence on board merchant vessels will not be "inimical to the security of the United States". The inquiries directed to seamen under the regulations relate in major part to the exercise of First Amendment rights, asking about past or present membership in any group designated by the Attorney General as subversive.

The burden of satisfying the Commandant that the seaman does not have a "bad First Amendment character" is thrust upon the applicant, who must answer under penalty of perjury all of the Commandant's inquiries to him designed to expose his "subversive" associations, speech, or activities. But to cast upon an individual the onus of satisfying an administrative official that he is not subversive, i.e., that he has not exercised his rights of speech, association, or publication in a manner regarded as impermissible by that administrator, is an unconstitutional shifting of the burden of proof, violative of the Fifth Amendment's requirement of due process of law. *Speiser v. Randall*, 357 U.S. 513, 2 L.Ed.2d 1460, 78 S.Ct. 1332 (1958), and the Fifth Amendment's bar against self-incrimination, *Slochower v. Board of Education*, 350 U.S. 551 (1956).

B. The regulations further deny due process in failing to provide a hearing procedure that permits confrontation and cross-examination of all adverse witnesses during the screening process. This constitutional defect, condemned broadly in *Greene v. McElroy*, 360 U.S. 474, 3 L.Ed.2d 1377, 79 S.Ct. 1400 (1959), and specifically held to be fatal in *Parker v. Lester*, 227 F.2d 708 (9th Cir. 1955), has never been remedied by the Coast Guard. The regulations still contemplate the use of "faceless informers".

Although appellant Schneider never reached the "hearing stage" because of his refusal to answer inquiries that he believed to invade his constitutional rights, he could not be required to subject himself to a procedure so lacking in that fundamental fairness demanded by due process.

III.

The statute and regulations are unconstitutionally vague and overbroad in an area where "precision of regulation is the touchstone of constitutionality". *NAACP v. Button*, 371 U.S. 415 (1963). The vice of the statute itself in purporting to authorize regulations to prevent "subversive activity" and "subversive acts" in connection with maritime occupations is compounded by the rules and regulations which define these already vague phrases in terms of "seditious acts" and utterances, "support of foreign governments", and "advocacy of alteration of the government of the United States by unconstitutional means." Appellant is required, under penalty of perjury, to describe his past conduct in the very phrases that this Court found constitutionally unacceptable in the regulatory scheme set up in New York's Feinberg law, *Keyishian v. Board of Regents, supra*, p. 10, and in the various disclaimer oaths required of teachers and others in the line of cases leading up to *Whitehill v. Elkins*, No. 27, October Term, 1967, 36 Law Week 4006.

Appellant, had he wished to avoid conduct that would result in his being screened out of his lawful employment, could not have determined from the statute or the regulations what controversial activities in the area of speech or association he ought to have avoided to assure his continued eligibility for employment nor could he safely

describe those activities under oath in the terms required by the inquiries put to him.

IV.

Because the regulations thrust so broadly into areas of First Amendment freedoms, the only safe course for the 140,000 or more maritime workers presently affected by the screening program is to steer far wider of the potentially dangerous zone of controversial opinion, speech, or association. Moreover, if this program is applicable to one area of private employment thought to affect national security, it is potentially applicable to millions of additional workers not now covered by federally administered screening programs. This potentiality extends the "chilling effect" of maritime screening to virtually all private employment, and then to society as a whole. But "free expression [is] of transcendent value to all society." *Dombrowski v. Pfister*, 380 U.S. 479, 486, 14 L.Ed. 2d 22, 85 S.Ct. 1116 (1965). This threat to the freedom of all far outweighs any benefit which may be speculatively derived from barring persons with present or past radical sympathies from access to maritime facilities.

V.

The Commandant uses the Attorney General's list of subversive organizations as a touchstone to determine qualifications for special validations; membership in one or more of the listed organizations is treated as a sufficient ground to deny the constitutionally protected right to private employment. Where Congress by law bars private employment on the basis of membership in an organization, such a statute is a bill of attainder. *United States v. Brown*, 381 U.S. 437 (1965). Congress

may not authorize the Commandant to do what it is forbidden to do.

If the Magnuson Act authorizes the Commandant's use of the Attorney General's list to define the class of seamen having objectionable characteristics, the Magnuson Act operates as a bill of attainder.

VI.

Legislation thus trenching on First Amendment freedoms carries with it no presumption of constitutionality, but requires a demonstration of urgency and relevancy. An overriding necessity for protection from a clear and present danger must appear. But neither an urgent need for such a program in terms of evidence of any threat from acts of sabotage, nor any correlation between radical sympathies or associations and proclivity for acts of sabotage or threat of physical injury or damage was shown either in the Congressional history leading to the passage of the act, the promulgation of the executive orders, or the history of maritime employment in the United States. Absent such demonstrable need or relevancy, the statute and regulations fail the test required for constitutionality.

VII.

Neither the text of the Magnuson Act nor its congressional history gives any indication that Congress contemplated such a sweeping political inquiry as has been launched by the Commandant under the purported authority of the Act. If possible, congressional acts should be construed in such a way as to sustain their constitutionality. The Commandant's screening program raises serious constitutional problems. The Act should therefore be interpreted as granting no authority to the Comman-

dant to intrude into areas of political belief, advocacy, and association. If the Act authorizes the screening program, it unconstitutionally delegates legislative power to the executive.

ARGUMENT

I. The Jurisdiction of This Court Is Properly Invoked to Review the Decision of the Three-Judge District Court That the Magnuson Act Is Not Unconstitutional, and That the Executive Orders and Regulations Promulgated Under It Are Authorized and Valid.

In postponing further consideration of the question of jurisdiction in this case to the hearing on the merits, the court notified counsel that they should address themselves at the outset of their briefs and oral argument to the question of jurisdiction. Rule 16(6); cf. *Sweezy v. New Hampshire*, 354 U.S. 234, 1 L.Ed.2d 1311, 77 S.Ct. 1203 (1957).

In the complaint filed below (J.A. 2-6) appellant asked the court to declare unconstitutional, null, and void, 50 U.S.C. §191 and Executive Orders 10173, 10277, and 10352 issued under it, and regulations applying the act and executive orders, 33 C.F.R. parts 6 and 121, and to enjoin appellee from interfering with appellant's employment upon United States flag vessels in the application of the Act and executive orders and regulations issued thereunder. To hear this challenge a three-judge court was convened (J.A. 1).

The pre-trial order entered by the court noted as issues of law to be determined, a two-pronged attack, statutory and constitutional, that is, (1) whether the Magnuson Act authorized the kind of screening program which the Coast

Guard applied to bar appellant from private employment aboard merchant vessels and (2) whether, if so, the statute, executive orders, and regulations were unconstitutional (J.A. 14-15).

Counsel briefed and argued both points below.

Appellant continues his two-pronged attack in this court, challenging the constitutionality of a statute which purports to delegate unlimited authority to the executive to launch so broad an inquiry into ideas, speech, association, and the press as a precondition to private employment of seamen, see below, pages 29 to 39, and at the same time questioning whether the statute must necessarily, or indeed can properly, be construed to authorize such a broad invasion of constitutionally protected freedoms. See below, pages 59 to 65.

On the authority of *Parker v. Lester,* 227 F.2d 708 (9th Cir. 1955); *United States v. Gray,* 207 F.2d 237 (9th Cir. 1953); and *McBride v. Roland,* 369 F.2d 65 (2nd Cir. 1966), the court below rejected appellant's contention that the Magnuson Act does not authorize the screening program (J.A. 39-40), and then went on to rule that the regulations so authorized were in all respects constitutional (J.A. 42-43).

The Magnuson Act provides, *inter alia,* that whenever the President finds that the security of the United States is endangered by "subversive activity," p. A-1, he "is authorized to institute such measures and issue such rules and regulations" as are necessary to safeguard vessels, harbors, and ports and waterfront facilities "from sabotage or other subversive acts, accidents, or other causes of similar nature" (p. A-2).

The executive order upon which the present regulations are based, E.O. 10173, issued by President Truman on 18 October 1950, explicitly finds that "the security of the United States is endangered by reason of subversive activity," (p. A-2). No other finding is made. Thus, the act as applied through the executive order and the regulations is broadly directed against "subversive activity". A substantial constitutional question is presented by a statute that thrusts so broadly into an area where "precision of regulation is the touchstone of constitutionality". *NAACP v. Button*, 371 U.S. 415, 432-33, 9 L.Ed.2d 405, 83 S.Ct. 328 (1963).

In *Zemel v. Rusk*, 381 U.S. 1, 14 L.Ed.2d 179, 85 S.Ct. 1271 (1965), the question of jurisdiction was also postponed to the hearing on the merits on a record strikingly similar to this one. Thus, in *Zemel* there was a similar constitutional attack upon a regulatory scheme and a parallel constitutional attack upon the underlying statute that purportedly authorized the regulations. The complaint initially brought before the three-judge court alleged that the statute was invalid as an unconstitutional delegation of legislative power to the executive. Independently, the regulations purportedly authorized by the statute were attacked as violative of freedoms protected by the First Amendment. Finally it was alleged in *Zemel*, as here, that the statute failed to authorize the regulations.

The court's opinion dealt at the outset with the jurisdictional question posed by this dual constitutional challenge. It was urged by the Solicitor General that the attack was in reality upon an administrative, as opposed to a legislative, policy and that therefore a three-judge court need not have been convened. 381 U.S. at 6.

But the court then noted that the allegation that the acts[2a] "contain no standards and are therefore an invalid delegation of legislative power" was a constitutional challenge assailing the statutes themselves.

Although this constitutional argument directed at the statute itself was ultimately not accepted by a majority of the court, it was found to be substantial and to support the holding that the three-judge court was properly convened, and that this court therefore had jurisdiction of the appeal.

Having thus acquired jurisdiction, the court was free to deal with all of the challenges—to the statute itself, to the statute as applied by the regulations, and to the regulations standing alone.

Likewise appellant here in his complaint below directly attacked the Magnuson Act itself as unconstitutionally vague, J.A. 4, and argued this point in his trial brief (R. 134).[3]

The attack was directed toward the only substantial and legislatively operative words in the act itself that became applicable to appellant, the vague and ominous words

2a. The Passport Act of 1926, 44 Stat. 887, 22 U.S.C. §211(a) (1958 ed.); Immigration and Nationality Act of 1952, 66 Stat. 190, 8 U.S.C. §1185 (1958 ed.).

3. The attack on the statute itself for its vagueness appears in appellant's trial memorandum in the following language:

> "A statute that contains no definite standards, but depends upon shifting interpretations, moods, and attitudes, is antagonistic to the axiomatic theme of our jurisprudence that law must be unvarying in its application. The vice of unconstitutional vagueness is further aggravated where, as here, the statute and regulations touch upon the exercise of those freedoms protected by the First Amendment. See *Baggett v. Bullitt* [citation omitted], *Cramp v. Board of Public Instruction* [citation omitted], and see note 109 U.Pa.L.Rev. 67, 77-85 ["The void-for-vagueness doctrine in the Supreme Court," by Anthony G. Amsterdam].

"subversive activities" and "subversive acts". The constitutional infirmity of vagueness in the statutory use of precisely these words in a state act, R.C.W. 9.81.010 ff. (Washington) had already been considered by this court in *Baggett v. Bullitt*, 377 U.S. 360, 362-63; *cf. Whitehill v. Elkins*, No. 27, October 1967 Term, decided 6 November 1967, 36 Law Week 4006.

1. In light of the "constitutional doctrine which has emerged" since *Adler v. Board of Education*, 342 U.S. 485, appellant's challenge to the statute on its face cannot be regarded as insubstantial or frivolous, and clearly required the convening of the three-judge court below. *Keyishian v. Board of Regents of N.Y.*, 385 U.S. 589, 17 L.Ed. 629, 87 S.Ct. 675 (1967).[4]

The Magnuson Act belongs to that large category of statutes which become applicable to a particular person

4. Appellant also raised below, as an additional direct constitutional challenge to the Magnuson Act, the precise point which *Zemel* held to be the substantial constitutional challenge that there supported appellate jurisdiction. On page 11 of the trial brief (R. 97, ll. 15-24) appellant argued:

> "Even if Congress' intent to authorize a personnel screening program were much more clear than it is here, there is reason to doubt that Congress could authorize creating of such a screening program by language as general as that of the Magnuson Act". See *Peters v. Hobby*, 349 U.S. 331, 350 (1955) (Black, J. concurring); [The concurring opinion at the page cited reads as follows: "I also doubt that Congress could delegate power to do what the President has attempted to do in the Executive Order under consideration here. And of course the Constitution does not confer law-making power on the President."] *Kent v. Dulles*, 357 U.S. 116, 129 (1958). [The Court's opinion at the page cited reads as follows: "If that 'liberty' is to be regulated it must be pursuant to the law-making functions of the Congress, *Youngstown Sheet & Tube Co. v. Sawyer*, [citation omitted]. And if that power is delegated, the standards must be adequate to pass scrutiny by the accepted tests. See *Panama Refining Co. v. Ryan*, [citation omitted]. . . . We hesitate to find in this broad generalized power an authority to trench so heavily on the rights of citizens." 357 U.S. 116, 129.]

or class only upon implementation by "measures" or "rules and regulations" effected by the executive. The contours of the underlying legislation cannot be fully understood until the issuance of the administrative rules and regulations.

The unconstitutional potentiality of the statute itself can be challenged only when protected rights of an individual are infringed by the executive and administrative action. If the challenged infringements upon individual rights and freedoms are authorized by the underlying statute, as the court below held they were in this case, a single federal judge is without jurisdiction to afford the injured litigant the full relief to which he is entitled, and his injury is further compounded by delay in the ultimate vindication of his claim and redress of his grievance. It cannot be assumed that Congress intended to restrict the convening of a three-judge court to those situations in which the statutes attacked were self-sufficient and able to be enforced without the aid of interpreting administrative rules and regulations.

We read *Zemel* as holding that once a genuine and substantial challenge to the statute is ascertained from the issues framed before the three-judge court, *jurisdiction* on appeal to this court is established. Whether or not the particular substantial constitutional challenge so ascertained is ultimately sustained after hearing on the merits, this court may properly consider every issue raised before the three-judge court. In this case these also include questions arising from the regulations alone: Whether these implementing regulations deprive appellant of due process of law and require him to surrender constitu-

tionally protected rights and freedoms as a condition to his pursuit of his calling; whether they unconstitutionally restrict freedoms guaranteed by the First Amendment; and whether they constitute a bill of attainder and an ex post facto law. They include the non-constitutional questions of whether the statute does in fact authorize the regulatory screening program at all, and whether it authorizes the specific procedures applied to prevent consideration of his application for validated documents. We submit that it is the rule of *Zemel* that all of these matters are properly before this court.

II. The Commandant's Regulations Fail to Afford Due Process of Law.

A. *The Commandant's Regulations Improperly, and in Violation of Due Process of Law, Shift the Burden of Proof in Screening Procedures from the Government to the Seaman-Applicant.*

The right to hold specific private employment and to follow a chosen profession free from unnecessary governmental interference comes within the liberty and property concepts protected by the Fifth Amendment. *Greene v. McElroy*, 360 U.S. 474, 3 L.Ed.2d 1377, 79 S.Ct. 1400 (1959). The employment in which appellant seeks to engage is private employment. It can be regulated only under the limitations of fundamental concepts of due process of law.

This screening program in no way involves the right of private employers in the maritime industry to create and maintain their own standards for employment. The screening program of the Coast Guard applies prior to the time that the would-be mariner seeks to obtain private employment as a pre-condition to his entry into this field of

employment at all. In this respect, the Coast Guard's screening program is unique among the governmental security programs now in effect.[5]

The regulations applicable to appellant and other seamen explicitly and repeatedly put on the seaman the burden of establishing a negative fact: that his presence aboard vessels would *not* be inimical to the security of the United States.

A detailed examination of 33 C.F.R. part 6 and part 121, demonstrates clearly that in the Coast Guard screening program, the applicant bears this burden of persuasion. No person may be issued a document required for any employment on a merchant vessel "unless the Commandant is satisfied that the character and habits of life of [the workman] are such as to authorize the belief that [his] presence . . . on board would not be inimical to the security of the United States." 33 C.F.R. §6.10-1, p. A-7 below.

This is the same standard of proof that is required for "special validation for emergency service" of a seaman's previously issued Merchant Mariner documents, the endorsement here sought by appellant. 33 C.F.R. §121.07, p. A-14 below.[6]

The process of securing the validation must be begun by the mariner. 33 C.F.R. §121.05(a), p. A-13 below. The regulations require that the applicant furnish all informa-

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5. The other security programs administered by Federal agencies apply to Federal employment, or private employment with a specific contractor with the United States.

6. The same standard of proof is required to be met by the applicant for the Coast Guard Port Security Card created by 33 C.F.R. §6.10-5 and 6.10-7, p. A-8 below.

tion demanded of him by the Coast Guard, §121.05(c)(1), pp. A-13 to A-14 below.

Where, in the opinion of the Coast Guard, the applicant "fails or refuses to furnish the required information or fails or refuses to make full and complete answer with respect to all matters of inquiry", the Coast Guard does as it did here—it stops all work on the application, §121.05(c)(2), p. A-14 below, §121.05(d)(2), p. A-14 below.

It appears from the Regulations, then, that the mariner must assume the initial burden. If his showing is insufficient[7] the Coast Guard issues a notice to that effect giving reasons for the Commandant's not being satisfied as to applicant's character, etc. (§121.09(f), p. A-15 below, §121.11(a), p. A-15 below). The mariner may file a response to the notice, §121.11(b), p. A-15 below. If the response is unsatisfactory, the case goes to a Hearing Board, §121.11(e), p. A-16 below.

The regulations do not state whether the applicant or the Coast Guard opens the evidence before the Hearing Board, and practice varies. *Cf. U.S. v. Gray*, 207 F.2d 237 (9th Cir. 1953) at 240-1, and *McBride v. Roland*, 369 F.2d 65 (2nd Cir. 1966). But the applicant continues to carry the burden of persuading the Commandant that the workman's presence "would not be inimical to the security of the United States", §121.21(a), p. A-19 below.

If as a result of this hearing and the recommendation of the Board, the Commandant is still not satisfied, he notifies the mariner again (§121.21(b), p. A-19 below)

7. The pre-trial order in this case makes clear that the Coast Guard had no independent evidence, at least up to 30 September 1966, that appellant was a person whose "presence would be inimical and rejects this as immaterial to the issues in the case (J.A. 14).

and the mariner may appeal to an Appeal Board (§121.23 (c), p. A-19 below). Once again the Commandant must be satisfied as to the mariner's habits, etc., §121.25(b), p. A-20 below.

At all stages, from the initial application for validation in which the prospective mariner must supply information about his exercise of First Amendment rights in the area of association to the final stage of administrative determination, the seaman must justify to the Coast Guard his exercise of First Amendment rights. He must prove that he does not have a bad First Amendment character.

This defect was inherent in the screening program from its outset and was noted in *Parker v. Lester*, 227 F.2d 708 (9th Cir. 1955), a proceeding in which some six hundred seamen applicants were granted their special validations by court order because of glaring violations of due process of law in the then-existing program. The Court of Appeals said at 712: "In short, the burden was placed on the seaman." Despite some changes in the program as a result of that litigation, no effort was made by the Commandant to remove the burden of proof from the applicants and shift it to the government.

Speiser v. Randall, 357 U.S. 513, 2 L.Ed.2d 1460, 78 S.Ct. 1332 (1958), establishes that to place such a burden on the exercise of First Amendment rights is violative of due process of law. Speiser was required first to show that he was a veteran to qualify for tax exemption. As a second qualifying standard he was required to show by a disclaiming oath that his exercise of First Amendment rights was of a non-criminal character. It was assumed in *Speiser* that California had a legitimate interest

in refusing a tax exemption to a person engaged in proscribed speech for which he might be criminally prosecuted, but the method chosen to suppress "criminal speech" denied due process by shifting the burden of proof.

Here, Schneider has been required to show, and has shown, that he possesses the skills required to pursue his employment as a seaman. As in *Speiser* it may be assumed here that the Federal government has an interest in preventing persons who will commit sabotage from shipping on United States flag vessels. *Speiser* holds that the applicant who has made a *prima facie* showing that he falls within the class entitled to exercise a right may not be required to carry the burden of showing that he is not within the criminal class. Schneider, however, is required by the Commandant to show that he does not fall within the group of persons whose "presence on board would be inimical to the security of the United States," where "inimical" clearly refers to exercise of First Amendment rights.[7a] But *Speiser* teaches that it is the government that has the burden of establishing that the appellant falls within the class of people who can be barred from exercising these constitutionally probated rights, for "Due process commands that no man shall lose his liberty unless the government has borne the burden of producing the evidence and convincing the fact-finder of his guilt." 357 U.S. at 526. The government "must provide procedures which are adequate to safeguard against infringement of constitutionally protected rights—rights which are essential to the workings of a free society." 357 U.S. 513 at 521.

7a. See below, p. 32-36.

The improper shift of the burden of proof began in Schneider's case, as it did in Speiser's, at the very outset, when the government insisted upon answers to interrogatories probing deeply into protected areas of belief, association, and speech, and carrying the unmistakable implication that Schneider had to prove himself to the Coast Guard. In explaining its second set of inquiries, the Coast Guard said that Schneider's original application "does not contain in the judgment of the Commandant, sufficient information for a determination with respect to your eligibility" (J.A. 34). Schneider was required to explain away his membership in organizations, his supposed reading of the "People's World", and to give a satisfactory account of his views on "Communism" and "the form of Government in the United States".

His failure to give such explanation was regarded by the Commandant as a wholly sufficient reason to stop all work on his papers (J.A. 34), relying on 33 C.F.R. §121.05 (c)(2), (p. A-14 below). The Commandant asserts, with a show of ingenuousness, that §121.05(c)(2) does no more than put teeth into a requirement that the seaman "cooperate" with the Coast Guard in the process of special validation. In fact, however, the Coast Guard is requiring Schneider as a pre-condition of the Coast Guard's even *considering* the possibility of letting Schneider work, to waive vital First Amendment rights by divulging (under penalty of perjury) his past, lawful political activities, his past and present political beliefs – which no man can be required to divulge to government as a conditon of private employment – his activities, if any, on behalf of a lawful newspaper, and his present estimates of the goals of various suspected groups.

Appellant is protected by "the guarantee of the First Amendment that a person can speak or not, as he chooses, free of all governmental compulsion," *DeGregory v. Attorney General of New Hampshire*, 383 U.S. 825, 830, 16 L.Ed.2d 295, 86 S.Ct. 1148 (1966). As in *DeGregory*, no showing is made of untruthfulness in appellant's answers to prior inquiries; the information sought about appellant's acts is "historical, not current." See also, as to the right to anonymity in exercise of First Amendment rights, *Talley v. California*, 362 U.S. 60, 4 L.Ed.2d 558, 80 S.Ct. 536 (1960).

Further, insofar as the inquiries relate to past conduct that might be regarded as unlawful advocacy or association, the Coast Guard patently seeks to condition the exercise of the right to employment upon waiver of the right not to accuse one's self. This the government may not do. *Slochower v. Board of Education*, 350 U.S. 551, 100 L.Ed. 642, 76 S.Ct. 637 (1956). In employee screening programs, government may not *require* disclosure of such associations under penalty of perjury, even though the risk of prosecution *seems* slight, for "experience teaches us that prosecutors too are human," *Cramp v. Board of Public Instruction*, 368 U.S. 278, 287, 7 L.Ed.2d 285, 82 S.Ct. 275 (1961).

As the Court said in *Baggett v. Bullitt*, 377 U.S. 360, 373, 12 L.Ed.2d 377, 84 S.Ct. 1316 (1964):

> "Well-intended prosecutors and judicial safeguards do not neutralize the vice of a vague law."

What was true for a lawyer in *Spevack v. Klein*, — U.S. —, 17 L.Ed.2d 574, 87 S.Ct. — (1967), is equally true for a mariner:

> "*** the Self-Incrimination Clause of the Fifth Amendment *** extends its protection to lawyers as well as other individuals, and *** it should not be watered down by imposing the dishonor of disbarment and the *deprivation of a livelihood* as a price for asserting it." 17 L.Ed.2d at 577 (Emphasis added).

The same principle was applied by this Court in *Garrity v. New Jersey*, — U.S. —, 17 L.Ed.2d 562, — S.Ct. — (1967):

> "The option to lose their means of livelihood or pay the penalty of self-incrimination is the antithesis of free choice to speak out or to remain silent." 17 L.Ed.2d at 565.

B. *The Existing Regulations Fail to Provide Confrontation of Adverse Witnesses and Adequate Notice of the Government's Case Against the Workman.*

The fundamental failure of due process in *Parker v. Lester*, above, p. 11, was the denial of adequate notice and hearing to the applicants. The court there noted that under the existing system, "there is no provision whatever for notice and an opportunity to be heard as generally understood to be required by the provisions of the Fifth Amendment relating to due process" (at 716). In response to that decision, the regulations were amended to provide some additional information to the seaman prior to his hearing before the various boards in the screening process. However, the regulations still fail to provide adequate notice or confrontation. *Greene v. McElroy*, 360 U.S. 474, 3 L.Ed.2d 1377, 79 S.Ct. 1400 (1959), establishes the constitutional requirement of adequate notice, confrontation, and cross-examination in employment-screening programs. However, the Coast Guard regulations now permit Hearing Boards (the initial panels

that pass upon contested cases) to withhold information from confidential sources. 33 C.F.R. §121.19(g), p. A-18 below, provides in relevant part: "If the applicant or holder is, or may be handicapped by the *nondisclosure to him of confidential sources*, or by the failure of witnesses to appear, the Hearing Board shall take the fact into consideration." (Emphasis added.) 33 C.F.R. §121.19(f), p. A-18 below, provides: "Every effort should be made to produce material witnesses to testify in support of the reasons as set forth in the notice of the Commandant [to applicants, stating reasons for denying the application for special validation], in order that such witnesses may be confronted and cross-examined by the applicant or holder."

It is evident, however, that subsection (g) permits the Hearing Board to rely on confidential information secured from any source and appearing in the dossier of the seaman as presented to the Hearing Board by the Commandant. Thus, the regulations still fail to provide for full and fair hearings, and therefore fail the tests of *Parker* and *Greene v. McElroy*, and fail to avoid the vice of faceless informers. The procedures still lack due process, the regulations are vitiated by this lack, and the screening program violates the Fifth and Sixth Amendments.

III. The Statute, and the Regulations Issued Under It, Are So Vague As To Be Incapable of Understanding, and Therefore Violate Substantive Due Process.

A. *The Magnuson Act Is Fatally Vague As to the Conduct To Be Regulated.*

The statute in relevant part authorizes the President to issue rules and regulations "to safeguard against destruction, loss, or against injury from sabotage, subversive

acts, accidents, or other causes of similar nature, vessels, harbors, ports, and waterfront facilities." At this point, we may assume that the terms "sabotage" and "accidents" have a relatively clear meaning. However, in using the phrase "subversive acts . . . or other causes of similar nature" the statute goes far beyond any clearly understood phrases and authorizes the issuance of regulations that cannot and do not have a clearly understood or understandable meaning.

The statute appears to authorize the executive to screen off seamen and others from vessels, wharves, ports, and harbor facilities, for some reason. The statement of the reason nowhere appears in the statute in terms such that a person of ordinary understanding can predict what conduct or omission will incur the displeasure of the President or his delegate. Indeed, it is not plain from the statute whether past conduct, previously unexceptional, now gives cause for prevention of private employment (See p. 54 below).

"Subversive acts . . . or other causes of a similar nature" is neither self-defining nor defined.

Legislative use of "subversive" as a definition of prohibited or disabling conduct by employees or would-be employees has repeatedly led this Court to find such legislation unconstitutionally vague. Thus, in *Baggett v. Bullitt, supra,* p. 19, "subversive" persons were barred from public employment in the State of Washington. "Subversive person" was defined at length (R.C.W. 9.81.060, 377 U.S. at 362 and n. 1, 363). The Court found that Washington statute void for vagueness, 377 U.S. at 367-371, owing precisely to the use of the word "subversive" and the absence of any understandable definition thereof.

So also, in *Whitehill v. Elkins*, — U.S. —, 36 U.S. Law Week 4006, CCH U.S. S.Ct. Bulletin B 167-175, No. 25, Oct. 1967 Term, decided 6 Nov. 1967, where the Court struck Maryland's Ober Act, Art. 85A, Md. Anno. Code 1957, which uses in §13 the same vague phrase "subversive" to describe disqualifying conduct. Of that act, Justice Douglas wrote for the majority, "As we have said in like situations, the oath required must not be so vague and broad as to make men of common intelligence speculate at their peril on its meanings." (CCH Bulletin, B 170, p. 4 of slip sheet.) *Cf. Elfbrandt v. Russell*, 384 U.S. 11, 16 L.Ed.2d 321, 86 S.Ct. 1238 (1966); *cf. Keyishian v. Board of Regents*, 385 U.S. 589, 17 L.Ed.2d 629, 87 S.Ct. 675 (1967), where a complex statutory employee-screening program under New York's Feinberg Law was struck down, in part for its use of "subversive", "seditious", and other vague standards. The court referred to "the uncertainty as to the scope of [the statute's] proscriptions . . . as to the utterances and facts proscribed," 385 U.S. at —, 17 L.Ed.2d at 639.

B. *The Regulations Speak in Language Already Ruled By This Court To Be Unconstitutionally Vague.*

The seaman who turns to the regulations to learn what conduct or omissions are forbidden finds that as translated in the regulations, "subversive acts" becomes acts "inimical to the security of the United States" and the major thrust of the regulations is to "screen" those whose political advocacies or associations or utterances are deemed to be undesirable in the view of the author of the regulations. It is not insignificant that in 33 C.F.R. §121.03(b) the vague and ominous word "sedition" appears. The would-be applicant is told that no person

shall be issued merchant mariner documents, port security cards, or special validation "unless the Commandant is satisfied that the character and habits of life of such person are such as to authorize the belief that the presence of the individual on board would not be inimical to the security of the United States." "Inimical", a term having no definite meaning (*Cf. Keyes v. Carrick*, 268 S.W.2d 397 (Ct.App.Ky. 1954) is nowhere specifically defined in the regulations. However, the regulations do provide some possible clue as to the type of conduct which will perhaps be regarded as "inimical" and must be avoided by seamen seeking employment aboard U. S. flag vessels. The forbidden conduct is described in the five standards set out in 33 C.F.R. §121.03, p. A-13 below:

> "(a) Advocacy of the overthrow or alteration of the Government of the United States by unconstitutional means.
>
> "(b) Commission of, or attempts or preparations to commit, an act of espionage, sabotage, sedition, or treason, or conspiring with, or aiding or abetting another to commit such an act.
>
> "(c) Performing, or attempting to perform, duties or otherwise acting so as to serve the interest of another government to the detriment of the United States.
>
> "(d) Deliberate unauthorized disclosure of classified defense information.
>
> "(e) Membership in, or affiliation or sympathetic association with, any foreign or domestic organization, association, movement, group, or combination of persons designated by the Attorney General pursuant to Executive Order 10450, as amended."

No other acts or omissions are anywhere defined in the regulations.

Subsection (a), warning as it does against advocacy of alteration of the government by unconstitutional means, leaves completely unclear the meaning of the expression "unconstitutional means".

Does this language mean the force and violence condemned in *Dennis v. U.S.*, 341 U.S. 494, 95 L.Ed. 1139, 71 S.Ct. 857 (1951), although the term "force and violence" is nowhere used in the regulation? Does it mean *non*-constitutional means, such as political pressure, partisan politics, or public demonstrations? Does it include, as it did in *Keyishian v. Board of Regents*, p. 31 above, "mere advocacy of abstract doctrine"?

Subsection (b), read with care, creates as one of many questionable standards for determination of unsuitability for employment, the aiding of another to commit an act of sedition. It was precisely this indirect aid that the court found vague and objectionable in *Baggett v. Bullitt, supra*, p. 19. There, forbidden conduct included abetting another in the alteration of the constitutional form of government of the United States.

The court pointed out the impossibility of determining whether such statutory language was intended to cover "guiltless and knowing behavior", innocent acts that might indirectly result in the furtherance of possibly unlawful goals.

The use of the word "sedition" adds an additional dimension of vagueness to subsection (b). Where the comparable phrase "seditious words" was used in the Feinberg law, the court held in *Keyishian v. Board of Regents, supra*, p. 31, that the language was "danger-

ously uncertain" (17 L.Ed.2d at 637)—that is to say, unconstitutionally vague. See also *N.Y. Times v. Sullivan*, 376 U.S. 254, 273-276, 11 L.Ed.2d 686, 702-704, 84 S.Ct. 710 (1964). These provisions clearly have the same defects of vagueness as the statute stricken down in *Keyishian*. These provisions are "plainly susceptible of sweeping and improper application", prohibiting "the employment of one who merely advocates the doctrine in the abstract without any attempt to indoctrinate others or incite others to action.". *Keyishian*, 17 L.Ed.2d at 638.

Another, even vaguer warning is given in (b) against "preparations to commit an act of . . . sedition"—what is meant by such a phrase?

It is difficult to understand what conduct is "defined" in subsection (c) that is not covered by others of the subsections.

Subsection (e) raises major questions of vagueness; the phrase "affiliation" and the phrase "sympathetic association" are both without understandable content, and are so vague as to be without meaning. Does "affiliation", does "sympathetic association", apply to cooperation with a proscribed organization in its wholly lawful activities? There is no support in the regulations for any contrary understanding. No reference is made to any other regulation or to any statute to supply a definition for either phrase. As was said in *Bridges v. Wixon*, 326 U.S. 135, 89 L.Ed. 2103, 65 S.Ct. 1443 (1945):

> "Individuals, like nations, may cooperate in a common cause over a period of months or years though their ultimate aims do not coincide. Alliances for limited objectives are well known."

If "sympathetic association" and "affiliation" have narrow meanings, those meanings do not appear in the standard. If they have broad meanings, serious constitutional questions are immediately raised. (*Cf. Cramp v. Board of Public Instruction*, 368 U.S. 278, 7 L.Ed.2d 285, 82 S.Ct. 275 (1961); *Baggett v. Bullitt, supra*, p. 19; *Elfbrandt v. Russell, supra*, p. 31; *Keyishian v. Board of Regents, supra*, p. 31.

The ultimately fatal vice both of the statute and the regulations is that they provide no standard by which appellant and other would-be merchant mariners can regulate their conduct prior to seeking a special validation, so as to be sure that they are not subject to being screened off. It is obvious, of course, that any attempt to avoid conduct that may be regarded as "inimical" means steering wide of any conduct which could be deemed controversial in the exercise of First Amendment rights. See *Speiser v. Randall*, 357 U.S. 513, 526.

Between 1942 and 1949, appellant sailed on U.S flag vessels in various capacities, ranging from wiper to second assistant engineer. From 1949 until his application for a special endorsement was made, he had not sailed on U.S. flag vessels. During the great bulk of that time, of course, the Magnuson Act and the Coast Guard's regulations purporting to put flesh on the legislative bones of the Magnuson Act were in effect. During appellant's absence from the maritime industry, how should he have conducted himself so as not to run afoul of 33 C.F.R. part 121, should he decide, at a later date, to apply for a special endorsement? What political activity was he permitted to engage in and what political activity was he for-

bidden to engage in? Could he derive the answers to such questions by examining the phrase "subversive activities" in Executive Order No. 10173? What should he have done so that his "character and habits of life" would "not be inimical to the security of the United States" during the time that he was away from the sea? What activity is permitted and what activity forbidden by such language as this? Was the reading of the *"Peoples' World"* forbidden? Was it a relevant factor? Should appellant have understood that he read the *"Peoples' World,"* or subscribed to the *"Peoples' World,"* or engaged in activities "in its behalf" at his peril? (J.A. 35.)

It is appellant's contention that the regulations and the executive order gave him no warning as to what conduct would and would not be taken into account at such time as he might choose to apply for a special endorsement. Are not mariners as entitled to a fair warning concerning potential loss of livelihood as are sit-in demonstrators at Southern lunch counters? (*Cf. Bouie v. Columbia*, 378 U.S. 347, 12 L.Ed.2d 894, 84 S.Ct. 1967 (1964).) The fact that appellant is not being prosecuted for a crime does not change the rules for precision in the governing regulations. See for example *A.B. Small Co. v. American Sugar Refining Co.*, 267 U.S. 233 (1925).

A careful mariner knowing of the broad, vague, and threatening language from the regulations must make a decision either to run the severe risk of loss of employment or of foregoing constitutionally protected activities so as to stay on the safe side of an uncertain boundary between the licit and the illicit.

C. *Administrative Application of the Regulations Has Not Cured Their Vagueness But Instead Has Raised New Problems of Vagueness.*

It cannot be argued that the vagueness of the regulations has been cured by their administrative application. In case-by-case application, it appears that the Commandant seeks to require merchant mariner applicants for special validation to answer special interrogatories couched in language that is, if possible, even more vague than the regulations themselves. Seven special interrogatories were posed to appellant: all are discussed below. Among them, however, the following seem especially vague:

No. 5 "What is your present attitude toward the Communist Party?"

No. 6 "What is your present attitude toward the principles and objectives of communism?"

No. 7 "What is your attitude toward the form of Government in the United States?"

To require what amounts to essays on these topics as a condition of employment on shipboard is a high point in fatuity and emphasizes the lack of clarity and precision in the government's search for possibly disqualifying attributes of the would-be seaman.

To take interrogatory Number 6, as an example, who is to define "the principles and objectives of communism"? Restricted, as the government has attempted to restrict it, to the "principles of Marxism—Leninism"[8] the appellant still has no guide as to whose understanding of these principles is to be used as an appropriate starting point for the essay. The teaching of numerous cases is that the

8. Only in an answer to an interrogatory after this litigation was begun. Answer 22, R. 41.

political movements in the United States advocating the principles of communism have many lawful, as well as some possibly unlawful, principles and objectives. Which principles and objectives are the relevant ones for discussion?

The word "communism" itself means many things to many people. It is so vague, indeed, that numerous political parties have sprung up around the world, each asserting that it and only it has a full and correct understanding of the implications of the term. The Commandant understands this term to mean "Marxism-Leninism", but he has not seen fit to communicate that understanding in his interrogatories to the applicant.

In each of the interrogatories the use of the word "attitude" raises problems of definition. The applicant after all is being asked to define his attitude in terms of the Commandant's understanding of what that word may mean. This is no easy task.

D. The Statute and Regulations Require Appellant to Choose Between the Penalty of Perjury Prosecution in Answering Vague Questions and the Penalty of Relinquishing His Right to Seek Private Employment.

The statute and regulations require Schneider to navigate through a minefield of criminal penalties before he is permitted to follow his calling. If he ships without his special validation, he is a felon (50 U.S.C. §1928; see *U.S. v. Gray*, 207 F.2d 237 (9th Cir. 1953)). To secure validation, his papers, completed under pains of perjury, 18 U.S.C. §1001, must show that: he forswears past guiltless knowing membership, *cf. Elfbrandt v. Russell*, p. 31 above; he disassociates himself from past "affiliation" or

"sympathetic association" (33 C.F.R. §121.03(e), with groups on the Attorney General's list, when no man can say what acts or through words such as "affiliation" or "association" are designed to include, *cf. Baggett v. Bullitt*, p. 19 above, *Cramp v. Board of Public Instruction*, p. 35 above; he declares himself *not* an advocate of alteration of the government by unconstitutional means (§121.03 (a)); he declares his words and writings free of sedition and he himself innocent of "preparations to commit . . . sedition," *Keyishian v. Board of Regents*, p. 31 above. The Coast Guard asks of Schneider that in his answers to the special interrogatories he make declaration of his political orthodoxy, unswerving conventional loyalty, and innocence of unlawful or other association with radical groups. In effect, he is required to write his own loyalty oath, to meet the shadowy requirements of the Coast Guard.

IV. The Program Threatens Abridgement of Plaintiff's And All Other Seamen's Freedom of Speech And Freedom of Association and Is Therefore Constitutionally Impermissible.

Under the Federal constitutional system, beliefs are inviolate. *Cantwell v. Connecticut*, 310 U.S. 296, 84 L.Ed. 1213, 60 S.Ct. 900 (1940). Moreover, since "[e]ffective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association . . . " *NAACP v. Alabama*, 357 U.S. 449, 2 L.Ed.2d 1488, 78 S.Ct. 1163 (1958), this court has repeatedly held that freedom of association is guaranteed by the First Amendment. *Aptheker v. Rusk*, 378 U.S. 500, 12 L.Ed.2d 992, 84 S.Ct. 1659 (1964) (collecting cases). See, Emerson, *Freedom of Association and Freedom of Expression*, 74 Yale L.J. I (1964).

These freedoms are protected not only against frontal attack, but also from being stifled by more subtle governmental interference. *Bates v. Little Rock*, 361 U.S. 516, 4 L.Ed.2d 480, 80 S.Ct. 412 (1960). As Mr. Justice Jackson recognized in *Thomas v. Collins*, 323 U.S. 516, 89 L.Ed. 430, 65 S.Ct. 315 (1945), in a concurring opinion:

> "It is not often in this country that we now meet with direct and candid efforts to stop speaking or publication as such. Modern inroads on these rights come from associating the speaking with some other factor which the state may regulate, so as to bring the whole within official control. Here, speech admittedly otherwise beyond the reach of the states is attempted to be brought within its licensing system by associating it with 'solicitation.'" (U.S. at 547)

The constitutional right to freedom of association is not to be discouraged by barring one from employment because of the free exercise of such rights. See *Cramp v. Board of Public Instruction*, 368 U.S. 278, 7 L.Ed.2d 285, 82 S.Ct. 275 (1961); *Konigsberg v. State Bar of California*, 353 U.S. 252, 1 L.Ed.2d 810, 77 S.Ct. 722 (1957); *Elfbrandt v. Russell*, 384 U.S. 11, 16 L.Ed.2d 321, 86 S.Ct. 1238 (1966).

In *Cramp*, the U.S. Supreme Court, in holding that a test oath imposed upon state employees was unconstitutionally vague, emphasized that such an oath had a potentially inhibiting effect on free speech. The court wrote, 368 U.S. at 287:

> ". . . the statute in question operates to inhibit the exercise of individual freedoms affirmatively protected by the Constitution. As we said in *Smith v. California*, ' . . . stricter standards of permissible statutory vagueness may be applied to a statute hav-

ing a potentially inhibiting effect on speech; a man may the less be required to act at his peril here, because the free dissemination of ideas may be loser.'"

Inquiries to seamen made under the regulations intrude into and threaten "the cherished freedom of association protected by the First Amendment" (*Elfbrandt v. Russell, supra,* p. 40). These inquiries are afflicted with "[t]he vice of unconstitutional vagueness . . . further aggravated" by operating in area which "inhibit[s] the exercise of individual freedoms affirmatively protected by the Constitution," *Cramp v. Board of Public Instruction, supra,* p. 40 (368 U.S. at 287).

The inquiries into organizational membership relate to matters, which as we develop further below at pp. 53 to 61, are remote and conjectural with respect to the legislative intent to prevent sabotage. The inquiries are improper "[b]ecause First Amendment freedoms need breathing space to survive, [and therefore] government may regulate in the area only with narrow specificity", *NAACP v. Button,* 371 U.S. 415, 9 L.Ed.2d 405, 83 S.Ct. 328 (1963) at U.S. 432-33.

In other words, inquiries into one's organizational affiliations in matters political are considered to be inquiries into areas protected by the First Amendment. The government intrudes here only with grudging permission of the courts, on showings of the strongest necessity. Here, no such showing has been made. Additionally, the inhibiting effect of government's hostile examination into protected beliefs and associations should be weighed.

If a decision is reached, as can be only rarely, if ever, constitutionally permissible, that an individual may be ex-

cluded from a calling because of his beliefs, or his failure to reveal or explain them to government, such an exclusion must be supported by substantial evidence that he personally subscribes to the impermissible, disqualifying beliefs. It is not enough that he belongs to an organization, some of the objectives of which, if he shared them, would justify his exclusion from employment. See for example *Wieman v. Updegraff*, 344 U.S. 183, 97 L.Ed. 216, 73 S.Ct. 215 (1952), where a conclusive presumption of "disloyalty" springing from membership in certain blacklisted organizations was overturned by this Court; innocent membership could not be so punished. But his membership must not only be knowing; it is now well settled that he may be excluded only if it is shown that he had a "specific intent" to further the illegal objectives of the organization or personally participated in the organization's illegal activities. *Elfbrandt v. Russell, supra,* p. 40; *Aptheker v. Rusk, supra,* p. 40. *Cf. Scales v. U.S.*, 367 U.S. 203, 6 L.Ed.2d 782, 81 S.Ct. 1469 (1961); *cf. Noto v. U.S.*, 367 U.S. 290, 6 L.Ed.2d 836, 81 S.Ct. 1517 (1961).

Elfbrandt shows the impropriety of assuming, as the Coast Guard has evidently done, that membership in an organization in and of itself is particularly revealing of one's propensities to do harm, for the court said:

> "Those who join an organization but do not share its unlawful purposes and who do not participate in its unlawful activities surely pose no threat, either as citizens or as public employees. Laws such as this which are not restricted in scope to those who join with the 'specific intent' to further illegal action impose, in effect, a conclusive presumption that the member shares the unlawful aims of the organization. See *Aptheker v. Secretary of State* [*supra,* p. 40, sub. nom. *Aptheker v. Rusk*] at 511. The unconstitutional-

ity of this Act follows *a fortiori* from *Speiser v. Randall*, 357 U.S. 513, where we held that a State may not even place on an applicant for a tax exemption the burden of proving that he has not engaged in criminal advocacy.

"This Act threatens the cherished freedom of association protected by the First Amendment, made applicable to the States through the Fourteenth Amendment. . . . A statute touching these protected rights must be 'narrowly drawn to define and punish specific conduct as constituting a clear and present danger to a substantial interest of the State.' *Cantwell v. Connecticut*, 310 U.S. 296, 311, 84 L.Ed. 1213, [60 S.Ct. 900, (1940)]. Legitimate legislative goals 'cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved' . . . A law which applies to membership without the 'specific intent' to further the illegal aims of the organization infringes unnecessarily upon protected freedoms. It rests upon the doctrine of 'guilt by association' which has no place here. See *Schneiderman v. U.S.*, 320 U.S. 118, 136; *Schware v. Board of Bar Examiners*, 353 U.S. 232, 246. Such a law cannot stand." (384 U.S. 817-9)

Nor can regulations issued pursuant to asserted legislative authority do more than a statute requiring an oath disclaimer. The vice of such regulations is two-fold: (1) the Commandant is authorized to treat membership in the proscribed organization as a sole and sufficient disqualifying factor, without being required to take into account the quality and purpose of the seaman's membership in the proscribed organization, (2) the effect of repeated inquiries into the political associations of seamen is certain to have a disabling, inhibiting effect on their exercise of First Amendment rights even under far more normal and common organizational auspices. See *Dombrowski v. Pfister*, above at p. 13.

This problem is taken up in some further detail at pp. 45-48 below dealing with the impact of the specific inquiries propounded to plaintiff after his answers to the initial form were evaluated and in the discussion at pp. 48-55 below on the question of these regulations as constituting a bill of attainder.

Unless it can be assumed that the merchant-seaman screening program in its inquiries about membership in organizations on the Attorney General's list is protected from constitutional challenge by a fiction that all of those organizations advocate only criminal and forbidden ideas and conduct — and it cannot be so assumed — then it follows that the Commandant must inevitably be inquiring of seamen what ideas they advocate that they are lawfully entitled to advocate. The special interrogatories put to appellant (J.A. 34-36) confirm this analysis. Lawful advocacy of ideas in the political, social, and economic spheres is not a proper subject of regulation by government absent a positive showing that the advocacy is likely to be immediately followed by unlawful conduct as a result of the persuasive powers of the advocate or his idea.

The Commandant has not restricted inquiry to the advocacy of unlawful action in such "clear and present danger" situations. He inquires of every seaman whether he belongs or ever belonged to any of the organizations on the Attorney General's list, without any qualification. Such inquiry carries with it the necessary implication that membership in such an organization is regarded by the appellee as having some relevance to the likelihood that one will commit acts of sabotage. To admit member-

ship in one of the organizations is to admit that one is in the suspect class. To join such an organization—and it is the undoubted right of any seaman to do so—is likely to be taken by the Commandant as a sign that one is a potential threat on the waterfront. 33 C.F.R. §121.03 (e), p. A-13 below.

Such hostile, suspicious inquiry into one's political beliefs, reinforced by the sanctions of loss of employment, punishment for perjury, and punishment for shipping out without the necessary validations, can only inhibit freedom of speech, association, and the press in areas of political and social unorthodoxy. Limits may be imposed on freedom of speech, press, advocacy, and associational conduct only when most narrowly and sharply defined. Any statute or regulation that has the vice of overbreadth and vagueness is unconstitutional. *NAACP v. Button*, 371 U.S. 415, 9 L.Ed.2d 405, 83 S.Ct. 328 (1963).

The detailed application of the regulations to appellant by the special interrogatories (J.A. 34-36) demonstrates further that the screening program is a constitutionally impermissible regulation and abridgement of freedom of speech, association and of the press.

The special interrogatories (J.A. 35) demand of appellant that he explain to the Coast Guard if and why he reads a certain newspaper, what he thinks about the government, and what are his inner convictions on weighty matters of social policy—all prior to any showing that he is in any way a dangerous person. Such inquiry, moreover, is not restricted to this one appellant.

The screening program authorizes the Coast Guard to conduct such sweeping inquiries into the past and present

political associations and beliefs of more than 130,000 maritime[9] and dockside workers. These employees of private employers[10] are required as a condition of their initial or continued employment to answer questions under penalty of perjury[11] covering a broad range of political affiliations and a wide spectrum of political attitudes and beliefs, such as the questions put to appellant (J.A.34-36).

If the protection of merchant ships and port facilities justifies screening employees by means of a test of their political beliefs because "there is a vital governmental interest at stake in preventing loss and injury to vessels, ports, and harbors of the Merchant Marine through sabotage and other subversive acts",[12] then the same reason-

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9. In calendar-year 1965 50,894 seamen were employed on United States-flag vessels of 1,000 gross tons and over, exclusive of vessels on inland waterways, the Great Lakes, and exclusive of United States government-owned vessels. Table 887, p. 607, "Statistical Abstract of the United States 1966" (Department of Commerce, Bureau of the Census). Employment figures for the category of United States-flag vessels between 100 gross tons (the minimum gross tonnage covered by the Magnuson Act and the regulations) and 1,000 gross tons are not readily available from official publications, but the number of such vessels is in excess of 11,000. Table 895, p. 611, "Statistical Abstract of the United States, 1966."

As of early 1966, the Coast Guard was receiving some 2,300 requests each month for original documents for seamen; testimony of Capt. Lynn Parker, U.S.C.G., Chief of the Merchant Vessel & Personnel Division of the Coast Guard, at p. 9, "Maritime Manpower Shortage," Doc. H.R. 89-30. At this rate, the Magnuson Act and the Coast Guard regulations are applied to some 28,600 more maritime workers each year.

In addition, the Coast Guard applies virtually identical screening procedures (33 C.F.R. 125.01 *et seq.*) to laborers in the longshoring labor pool ,which included about 88,000 men in 1965. See 1965 annual report of the U.S. Maritime Commission at p. 39.

The screening procedures have thus probably been applied to over a quarter-million workers in the 16 years of the Act's existence.

10. "Of the Federal Government Security programs only one involves persons who are not seeking some action or advantage from the government. That program is the one governing the security of vessels and waterfront facilities. . . ." *Government Security & Loyalty*, 51.1.

11. 18 U.S.C. §1001. See Note 1, *supra*, p. 1.

12. Opinion of the Court below, (J.A. 42).

ing would justify extension of such screening to all the transportation industries, to every industrial facility, should Congress so decide, and indeed even to those using streets and highways where goods needed in defense plants may pass to become targets of sabotage. Thus, the implications of the Act and regulations, upheld by the decision below, vitally affect every citizen in the United States whose occupation or activities take him to any facility which the Congress or the state legislatures (*Cf. Lerner v. Casey*, 357 U.S. 468) may deem vital to the "national defense".

Who can doubt the widespread "chilling effects" upon the exercise of First Amendment rights (*Dombrowski v. Pfister*, 380 U.S. 479, 487) of such a program? The only safe course for any of the hundreds of thousands of affected workmen who wishes to pursue his calling without serious risk of being forever barred from the waterfront or from crew membership, is to eschew any conduct that the Coast Guard might regard as "subversive" or "sedition"; any expression of political opinion; any association with known radicals; any reading of papers, books, or magazines suspected of disseminating unorthodox views, or indeed any attitudes basically critical to either past or prevailing policies of the government in conduct of national or international affairs. But it is the teaching of *Dombrowski* that in our system "free expression [is] of transcendent value to all society, and not merely to those exercising their rights," *Dombrowski, Elfbrandt v. Russell, supra*, p. 40, *Baggett v. Bullitt, supra*, p. 19 and *Cramp v. Board of Public Instruction, supra*, p. 40 were all decided following the last Court of Appeals decision interpreting the Magnuson Act. These decisions and *Keyishian*,

decided after the judgment below, in our opinion represent the view of this court that the values of free expression, communication, and exchange of ideas far outweigh any possible benefits which may be derived from an overzealous concern as to whether persons of present or past radical sympathies may, in some instances (and as we show below, pp. 58 to 59 potentially, rather than actually) pose any threat of any kind to the security of the United States as applied to shipping. These cases forbid the kind of unnecessary prying attempted here.

V. The Act, If It Authorizes the Regulations, Is a Bill of Attainder or an *Ex Post Facto* Law

A. *The Use of the Attorney General's List of Subversive Organizations, If Authorized by the Act, Amounts to an Attainder*

The screening program as applied in this case rests in part upon the use of the Attorney General's list of subversive organizations as a means of determining whether a seaman or ship's officer shall be qualified for employment. The "standards" set forth in 33 C.F.R. §121.03 (p. A-13 below, and p. 33 above) specifically provide that a factor which "may preclude" qualification of a seaman is "membership in or affiliation or sympathetic association with" an organization on the Attorney General's list. The regulations thus give the Commandant the right to exclude an applicant solely on the basis of membership in, or affiliation or association with, an organization on the list. This procedure, if authorized by Congress, as the lower court held it had been, bears the earmarks of a bill of attainder.

Clause 3 of Section 9 of Article I of the United States

Constitution (p. A-20, below) unqualifiedly forbids Congress to pass a bill of attainder in the following words:

> "No Bill of Attainder or ex post facto Law shall be passed."

Although attainder had the historical meaning of punishment by death, the landmark case of *Cummings v. Missouri*, 4 Wall. (71 U.S.) 277, held that its use in the Constitution was broader.

> "A bill of attainder is a legislative act which inflicts punishment without a judicial trial. If the punishment be less than death, the act is termed a bill of pains and penalties. Within the meaning of the Constitution, bills of attainder include bills of pains and penalties.

In *U.S. v. Lovett*, 328 U.S. 303, the court held that legislative exclusion of named people from public employment violated the prohibition against bills of attainder. In *Cummings v. Missouri*, 4 Wall. (71 U.S.) 277, 18 L.Ed. 356, and in *Ex parte Garland*, 4 Wall. (U.S.) 333, 18 L.Ed. 366, it was held that legislative exclusions of classes of persons from private employment (Cummings had been barred from acting as a priest and Garland sought readmission to the bar of the U.S. Supreme Court) were in each instance bills of attainder. It was intimated by Mr. Justice Black in his concurring opinion in *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123 at 143-44, that the proscription of named organizations by executive action has the characteristics of a bill of attainder. In *U.S. v. Brown*, 381 U.S. 437, the court struck down as a bill of attainder an act making it unlawful for one to serve as an employee or officer of a labor union if one was a member of a legislatively named organiza-

tion. Almost every bill of attainder case in this Court, from *Cummings v. Missouri*, to *U.S. v. Brown* involved legislative efforts to erect bars against employment because of past acts and associations. Legislative deprivation of employment is punishment, and such punishments imposed on named persons or on members of named organizations are attainders.

Thus, the prohibition against bills of attainder forbids the legislature to bar one from public or private employment by reason of membership in a proscribed organization. If the legislature were to name 270 organizations, rather than one, the act would nonetheless be a bill of attainder.

Here, the executive, claiming to act under Congressional authority, the Magnuson Act, asserts the right to exclude persons from private employment because of membership in (or affiliation or association with) any of a large number of organizations that have been named by the executive, also under asserted Congressional authority. If Congress had in terms named all the organizations on the Attorney General's list and then barred past or present members thereof from private maritime employment, such an enactment would have been a bill of attainder. *U.S. v. Brown*, p. 49 above. May the Congress delegate to the executive a power that the Constitution forbids the Congress itself to exercise? As was said in *U.S. v. Brown.*:

> "In a number of decisions, this Court has pointed out the fallacy of the suggestion that membership in the Communist Party, or any other political organization, can be regarded as an alternative, but equivalent, expression for a list of undesirable characteristics." (381 U.S. at 455)

The Commandant has attempted precisely to use membership in the organizations on the list as such an equivalent expression.

His acts are more subtle than the crude measure struck down in *Lovett*. They share some of the essential characteristics of *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 95 L.Ed. 817, 71 S.Ct. 624 (1951). In that case, the Court held that the attempt of the Attorney General to add three groups to his list of "subversive" organizations, for use of the Loyalty Review Board of the U.S. Civil Service Commission, was constitutionally improper, being arbitrary and capricious, and lacking due process of law as to the three organizations.

Justice Black, in one of the five opinions filed by the majority in *McGrath*, noted

> "officially prepared and proclaimed governmental blacklists possess almost every quality of bills of attainder, the use of which was from the beginning forbidden to both national and state governments. U.S. Const., Art. I, §§9, 10. It is true that the classic bill of attainder was a condemnation by the legislature, following investigation by that body, see *United States v. Lovett*, 328 U.S. 303, 90 L.Ed. 1252, 66 S.Ct. 1073, while in the present case the Attorney General performed the official tasks. But I cannot believe that the authors of the Constitution, who outlawed the bill of attainder, inadvertently endowed the executive with power to engage in the same tyrannical practices that had made the bill such an odious institution.
>
> "There is argument that executive power to issue these pseudo-bills of attainder can be implied from the undoubted power of the Government to hire and discharge employees and to protect itself against treasonable individuals or organizations. Our basic law, however, wisely withheld authority for resort to

> executive investigations, condemnations, and blacklists as a substitute for imposition of legal types of penalties by courts following trial and conviction in accordance with procedural safeguards of the Bill of Rights." 341 U.S. at 143-5 [footnotes omitted]

The attempt to *add to* the Attorney General's list by fiat was thus defeated. But the original list was promulgated by fiat, without notice or hearing, without judicial review, or any other slight shred of due process.

The merchant-marine screening program is valid, if at all, only because it has been authorized by the Congress. Neither the President nor the Coast Guard has inherent power to regulate employment of seamen. That power resides, in the Federal government, solely with the Congress. *Cf. Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 574, 96 L.Ed. 1153, 72 S.Ct. 863, 26 A.L.R.2d 1378 (1952). Subject to constitutional principles of delegation of powers, the Congress may authorize executive agencies to administer regulatory programs. Such programs can only be administered within the parameters of Congressional authority; what is done lawfully by such agencies is done *as if* the acts were those of Congress. Needless to say, Congress cannot authorize the President or lesser officials to do what is forbidden to Congress itself. See concurring opinion of Mr. Justice Douglas in *Peters v. Hobby*, 349 U.S. 331, at 352, 99 L.Ed. 1129, 75 S.Ct. 790 (1955).

It is the necessary position of the Commandant that he is authorized by statute to conduct the inquiries of which plaintiff here complains, for without such authority, express or implied, he acts beyond the law. Might then the Congress do what the Commandant claims that he may

do? Could the Congress designated suspect organizations *by name*? Such a listing, without opportunity for hearing and without notice, has already been forbidden to Congress by *Joint Anti-Fascist Refugee Committee v. McGrath, supra,* p. 51 and is therefore forbidden to appellee.

The most recent bill of attainder case from this Court is *United States v. Brown,* 381 U.S. 437, 14 L.Ed.2d 484, 85 S.Ct. 1707 (1965). There Congress endeavored to bar from certain kinds of employment in labor unions persons who were then or had during the last five years been members of the Communist Party. The statute, 29 U.S.C. §504, §504 of the Labor-Management Reporting and Disclosure Act of 1959, made it a crime for Communists to serve in all but the least significant posts in a labor union.

Brown, a well-known and avowed Communist, was convicted under the statute. His conviction was reversed by the Court of Appeals for the Ninth Circuit, with instructions to the district court to dismiss. The government brought the case to this court on certiorari, and the Ninth Circuit was upheld on the ground that the act was a bill of attainder within the meaning of the Constitution, Art. I, §9, cl. 3, and *Cummings v. Missouri, supra,* p. 49, and *Ex parte Garland, supra,* p. 49. The court's analysis shows that the naming of a particular organization creates an easily ascertainable group, within the doctrine of *Lovett.*

In the case at bar, the Coast Guard, acting as the arm of Congress, asserts the right to bar employment not only to past and present members of the Communist Party, but

also to past and present members of some 270 to 280 other organizations on the Attorney General's list. It has been said that even if a bill of attainder reaches all the persons possessing the characteristics that the legislature finds objectionable, and even if the basic legislative goal is proper, the act is not thereby saved from being a bill of attainder. Note 23, *United States v. Brown*, 381 U.S. at 489. Thus, a bill of attainder will not be saved from its proper fate because it attaints many rather than few.

Is the situation changed if Congress says, as the Commandant must maintain that it does say, that membership in one or more of the suspect organizations *may* (rather than *must*) be used as a decisive standard for depriving plaintiff and others of their rights to employment? We think not. A bill of attainder is no less prohibited by the Constitution because the President or some other, lesser functionary can waive its provisions. The President could have pardoned Archie Brown. The critical test to be applied is that one or more persons are named or defined by their membership in a specified organization, and that such naming or definition is authorized by the legislature to be used as a determinative bar from employment. The use of the arbitrary Attorney General's list by the Commandant, if authorized by the Magnuson Act, amounts to the act of the Congress and is a bill of attainder.

B. *The Commandant's Regulation Authorizing Use of the Attorney General's List Amounts to Ex Post Facto Regulation and Is Therefore Constitutionally Forbidden.*

The regulations (33 C.F.R. 121.03(e) p. A-13 below), authorize the use of the Attorney General's list, based as it

necessarily is on a determination made by the Attorney General (without notice or hearings) prior to the issuance of the regulations or the passage of the Magnuson Act. The list is necessarily based on events that predate its promulgation, and thus the regulations authorize the Commandant to bar appellant from employment on the basis of events—most or all of them lawful when done—that occurred long before the passage of the Act. Administrative pains and penalties may not thus be imposed for acts and associations lawful when they occurred. Such punishments, such regulations, are ex post facto and constitutionally forbidden.

VI. First Amendment Freedoms May Be Restricted, If At All, Only Upon a Showing of Urgent Need.

The Act and the regulations issued under it, we have shown, have an undoubted chilling effect on freedom of speech, press, and association, and on the fundamental right of belief that is posited by the First Amendment. Restrictions of those rights by statute may be upheld only upon a showing of urgent need, whether described in terms of Justice Holmes' famous "clear and present danger" test (*Schenck v. United States*, 249 U.S. 347, 63 L.Ed. 470, 39 S.Ct. 247 (1919)) or one of the more current formulations. Government must show a peril to be guarded against by the statute and a reasonable nexus of relevancy between the peril and the deprivation of constitutionally protected freedoms. Administrative procedures under such a statute must meet the same tests.

However, here, the inquiries made of plaintiff by defendant are neither relevant to the purpose of the screening program nor necessary to achieving its stated goals.

A. *The Legislative Purpose of Congress Was Narrowly Limited.*

The thrust of the Magnuson Act is to permit the President to prevent destruction or injury to vessels and to dock and harbor facilities. See pp. 29-30 above, pp. A-1, A-2. There is no suggestion in the statute that it is aimed at labor disturbances or at seditious propaganda or at espionage or any other form of criminal activity except deliberate physical destruction of vessels and facilities. The brief legislative history indicates that the purpose of the Magnuson Act was to amend the existing law by authorizing the President to institute measures and issue regulations to safeguard against sabotage or injury to harbors, ports, and waterfront facilities, including accidental injury, as well as to vessels, and in technical peace-time without declaring a national emergency. The prior law applied only to vessels and only when the President declared a national emergency. The primary effect of the amendments was so stated in the Senate report accompanying the bill (Senate Report No. 2118, July 21, 1950, 56 Cong. 1st Sess.) and in House Report No. 2740, July 25, 1950, 56 Cong., 1st Sess. Viewed in the light of the purposes of the Magnuson Act the techniques of control set up by the Coast Guard stray far from the legislative intent. The standards set up by 33 C.F.R. §121.03 are not specifically directed at harm to vessels or port facilities, but are aimed at far broader targets. The standard for the Commandant's consideration is whether or not the "presence on board vessels of the United States" of the mariner would "be inimical to the security of the United States". Whether these words have any clearly understandable meaning (see discussion above, pages 31 to 38), it is clear they go well

beyond the question of destruction of vessels.

Thus, the relevance of even the commission of an act of espionage (one of the standards found in §121.03) is doubtful. The advocacy of the overthrow or alteration of the government of the United States by unlawful force or violence, if this is the meaning of "unconstitutional" as used in standard §121.03(a) of the regulations, may arguably have relevancy to risk of deliberate harm to a vessel of the United States. Certainly, the risk of *accidental* harm to a vessel or to a dock because of a person's political beliefs is nil. The risk of deliberate harm depends upon a showing that certain beliefs will result in certain actions. Standard (b) "performing or attempting to perform, duties or otherwise acting so as to serve the interests of another government to the detriment of the United States" would seem to have no demonstrable relevance to the risk of accidental or deliberate harm to a vessel.

The consideration of whether a man would be "inimical to the security of the United States" has to do with a far broader range of inquiry than the Magnuson Act contemplates. One given to garrulity about classified information in his cups might be a dangerous man to employ as the director of public information for a strategic air command base or as a diplomat, but his infirmity in that respect cannot be said to demonstate anything at all about the possibilities of his inflicting deliberate harm on ships.

B. *The Inquiries Directed to Plaintiff Relate to Possible Membership in the Communist Party a Decade Ago and Are Irrelevant, There Being No Connection Between Such Past Membership and Present Risk of Sabotage by Plaintiff.*

With regard to Special Interrogatories 3 and 4 (J.A. 35), does appellee contend that one's predisposition to sabotage vessels or ports can be predicted from one's political reading matter? If so, what are the psychological text books so stating? Or does the government aver that "*People's World*" endeavors to incite its readers or supporters to acts of violence? If so, can the government show that such incitement has been or will be successful? In the absence of a detailed factual showing, such propositions must be dismissed as irrelevant and fallacious speculations, unworthy of further attention.

Of more moment are the issues raised by Special Interrogatories 1, 2, 5, 6 and 7. These inquiries addressed to plaintiff's admission, through counsel, that ten years or more ago he belonged to the Communist Party.

But such an admission is no foundation for these inquiries which can properly relate only to matters of fact relevant to a determination as to whether plaintiff is a potential saboteur.

In point of fact there is no basis for an assumption of any relationship between Communism and sabotage, and the government has made no effort to show such a connection.

It is safe to say that never in history has such intensive and extensive investigations by governmental agencies been conducted into any area of human association, advocacy and activity as have been made of the Communist

Party in this country. Despite this vast effort we confidently assert that the government cannot point to a single act of sabotage or other act of similar nature in which a Communist was even suspected.

To sustain its position it is incumbent on the government to show that the sweeping and vague inquiry into the present mental state of the appellant here on issues such as Communism, the form of government of the United States, or into the affiliations and associations that he may have had ten years prior to his present application for employment, have a reasonable and substantial relationship to whether he is a person likely to commit sabotage or otherwise intentionally to injure shipping or shipping facilities if he is employed at his vocation as a seaman.

The interrogatories to appellant in this case have no relation to the object of prevention of sabotage. Plaintiff's loyalty to the United States and his disassociation from organizations regarded as subversive are not matters that the government contests (J.A. 14). Since there is no reasonable or substantial relationship between the questions put to the appellant plaintiff under the regulations and the object sought to be obtained by Congress—prevention of sabotage—any regulation purporting to refuse clearance to appellant for shipping for the answers to questions of this type is void as a denial of due process.

VII. The Regulations of Appellee Are Not Authorized

A. *Congress Has Not Authorized the Merchant Seamen's Screening Program.*

The Coast Guard's program for the screening of merchant seamen and waterfront workers is singular, at least

among Federal loyalty programs, in effectively excluding an individual from a field of private employment in the absence of explicit statutory authority. The purported statutory authority for the program is the Magnuson Act, 64 Stat. 427 (1950), 50 U.S.C. §191 (1964), upon which both Exec. Ord. 10173 and the regulations thereunder rest.

The stated purpose of the Act is to safeguard shipping and port facilities against physical destruction, loss, or injury "from sabotage or other subversive acts, accidents, or other causes of similar nature."

There is no suggestion in the wording of the Act that its framers intended to authorize the type of sweeping political inquiries that have been directed to the appellant in this case or to seamen, longshoremen, and stevedores generally.

Since the Coast Guard screening program clearly impinges upon rights protected by the First Amendment, "precision or regulation must be the touchstone in an area so closely touching our most precious freedoms", *NAACP v. Button*, 371 U.S. 415, 438. Thus, if Congress had intended to establish a legislative equivalence between certain political beliefs or activities and a disposition to cause physical harm to shipping facilities, it must be presumed that the legislation would have been drawn with precision to define and limit such intended equivalence with sharp and clear definitions. The court has previously held that it will not assume that security clearance programs that fail to afford full due process have been authorized.

"Without explicit action by lawmakers, decisions of great constitutional import and effect would be

> relegated by default to administrators who, under our system of government, are not endowed with authority to decide them." *Greene v. McElroy*, 360 U.S. 474 at 507.

See also *Peters v. Hobby*, 349 U.S. 331, and cf. *Kent v. Dulles*, 357 U.S. 116.

It may well be that language no less broad than that of the Act would suffice to authorize an administrative program regulating a phase of the economy. This, however, is not such a case. Here the administration of the loyalty program inhibits the exercise of freedoms guaranteed by the First Amendment. This Court has indicated that it will not readily impute to Congress an intent to authorize an administrative official to restrict an individual's liberty on the basis of his beliefs and associations. *Kent v. Dulles, supra*, and see also *Cole v. Young*, 351 U.S. 536, 546-47, 100 L.Ed. 1396, 76 S.Ct. 861 (1956). In *Kent v. Dulles*, the Court refused to infer from general statutory language providing that "The Secretary of State may grant and issue passports . . . under such rules as the President shall designate and prescribe . . ." and prohibiting a citizen from entering or leaving the United States without a passport, that Congress had authorized the Secretary of State to restrict the liberty to travel on the basis of beliefs and associations.

Moreover, exclusion from employment as a security risk is tantamount to imposition of a criminal penalty. It is a "badge of infamy" which operates to exclude the person so classified from any desirable employment. *Wieman v. Updegraff*, 344 U.S. 183, 190-91, 97 L.Ed. 216, 73 S.Ct. 215 (1952); *Peters v. Hobby*, 349 U.S. 331, 351-2, 99 L.Ed. 1129, 75 S.Ct. 790 (1955) (Douglas, J., concurring):

"We deal here with the reputation of men and their right to work—things more precious than property itself. We have here a system where goverment with all its power and authority condemns a man to a suspect class and the outer darkness. . . . [O]ne of man's most precious liberties is his right to work. When a man is deprived of that 'liberty' without a fair trial, he is denied due process. If he were condemned by Congress and made ineligible for government employment, he would suffer a bill of attainder, outlawed by the Constitution. . . . An administrative agency—the creature of Congress—certainly cannot exercise powers that Congress itself is barred from asserting."

B. *Congress Did Not Authorize the Procedures Outlined in the Regulations or the Methods Followed by the Coast Guard in This Case.*

Even if the Magnuson Act did authorize the creation of a personnel screening program, it cannot be lightly assumed that Congress intended to authorize the existing program. It is well settled in security-clearance cases that in the absence of express Congressional authorization it will not be inferred that Congress intended to authorize a Governmental agency to dispense with traditional forms of fair procedure. *Cole v. Young, supra,* p. 61, *cf. Greene v. McElroy, supra,* p. 61.

In *Greene v. McElroy* the Court held that in the absence of explicit authorization the Department of Defense was not empowered to refuse security clearance in a proceeding in which the applicant was not afforded the safeguards of confrontation and cross-examination. The Court emphasized the importance of these rights, stating, 360 U.S. at 497:

". . . This Court has been zealous to protect these

rights from erosion. It has spoken out not only in criminal cases . . . but also in all types of cases where administrative and regulatory actions were under scrutiny."

C. ***If Congress Authorized the Screening Program, There Has Been an Unconstitutional Delegation of Legislative Authority.***

The executive's authority, if any, for creation of the merchant marine personnel screening program, comes from the following language of the Magnuson Act:

> "Whenever the President finds that the security of the United States is endangered by reason of *** subversive activity, *** the President is authorized to institute such measures and issue such rules and regulations –
>
> ***
>
> "(b) To safeguard against destruction, loss, or injury from sabotage or other subversive acts, accidents, or other causes of similar nature, vessels, harbors, ports, and waterfront facilities in the United States, the Canal Zone, and all territory and water, continental or insular, subject to the jurisdiction of the United States."

Under such a statute, neither the President nor the courts can say what the standards are by which the President is to accomplish Congress' purpose. The limits of the President's authority are nowhere indicated, and there is no way in which he can understand those limits. In the absence of such standards and limits, the delegation of authority is overbroad. *United States v. Rock Royal Cooperative*, 307 U.S. 533, 83 L.Ed. 1446, 59 S.Ct. 993 (1939). No class of persons to be regulated is defined or suggested by the Act. The declared policy of the Act – to prevent deliberate damage from "subversive acts" – carries

no suggestion as to the means to be employed by the President. No indication of "the necessity, time, and occasion of performance" of the President's delegated powers is given. See *Panama Refining Co. v. Ryan*, 293 U.S. 388, 440, 79 L.Ed. 388, 55 S.Ct. 241 (1935). The delegated power is "unconfined and vagrant," see concurring opinion of Cardozo, J., in *A.L.A. Schecter v. United States*, 295 U.S. 495, 551, 79 L.Ed. 1570, 55 S.Ct. 837 (1935).

One cannot tell what has been delegated, who is to be affected, and how long and in what areas regulations are to be in force.

The question of delegation of powers that is here raised is the other side of the coin of the question of vagueness of standards. In the area of exercise of First Amendment freedoms, rights may be affected only by narrowly drawn and specifically defined legislative guidelines for administrative officers. See *Lovell v. Griffin*, 303 U.S. 444, 82 L.Ed. 949, 58 S.Ct. 666 (1938); *Cantwell v. Connecticut*, 310 U.S. 296, 84 L.Ed. 1213, 60 S.Ct. 900 (1940); *Saia v. New York*, 334 U.S. 558, 98 L.Ed. 1574, 68 S.Ct. 1148 (1948); Cf. *Greene v. McElroy*, 360 U.S. 474, 3 L.Ed.2d 1377, 79 S.Ct. 1400 (1959).

In terms of the regulation between the legislative and executive branches of government, the question is, has the legislature abdicated its authority to create "standards for the exercise of discretion" (*Saia v. New York, supra*), to the administrator; such abdication is an unconstitutional delegation of power, especially in the area of First Amendment rights. From the standpoint of the affected individual, the question is, can he look to the statute, and discover what conduct the administrator is authorized to proscribe?

If a man of ordinary understanding cannot so discover, the statute is unconstitutionally vague. Where the legislature delegates broad authority to the executive to regulate freedom of speech, association, or press, the delegation is likely to be unconstitutional and the statute to be void for vagueness.

Congress, if it delegated such authority, did so in violation of Article I, Section 1, of the Constitution, which provides that "All legislative powers . . . shall be vested in a Congress of the United States," has delegated to the President the authority which resides solely in Congress to enact a broad legislative program, and has failed to provide any specific guidance or limits to executive discretion.

CONCLUSION

For each of the foregoing reasons, the judgment of the district court should be reversed with directions to grant appellant injunctive relief against the application of the Magnuson Act and regulations 33 CFR parts 6 and 121 to appellant, to order the immediate special validation of appellant's merchant mariner documents, and to proceed with the trial of the balance of the case.

Respectfully submitted,

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APPENDIX

U.S. CONSTITUTION

(The relevant portions of the Constitution appear at pp. A-20 to A-21 below.)

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50 U.S.C. §191 Regulation of anchorage and movement of vessels during national emergency

Whenever the President by proclamation or Executive order declares a national emergency to exist by reason of actual or threatened war, insurrection, or invasion, or disturbance or threatened disturbance of the international relations of the United States, the Secretary of the Treasury may make, subject to the approval of the President, rules and regulations governing the anchorage and movement of any vessel, foreign or domestic, in the territorial waters of the United States, may inspect such vessel at any time, place guards thereon, and, if necessary in his opinion in order to secure such vessels from damage or injury, or to prevent damage or injury to any harbor or waters of the United States, or to secure the observance of the rights and obligations of the United States, may take, by and with the consent of the President, for such purposes, full possession and control of such vessel and remove therefrom the officers and crew thereof and all other persons not specially authorized by him to go or remain on board thereof.

Within the territory and waters of the Canal Zone the Governor of the Canal Zone, with the approval of the President, shall exercise all the powers conferred by this section on the Secretary of the Treasury.

Whenever the President finds that the security of the United States is endangered by reason of actual or threatened war, or invasion, or insurrection, or subversive activity, or of disturbances or threatened disturbances of the international relations of the United States, the President is authorized to institute such measures and issue such rules and regulations—

(a) to govern the anchorage and movement of any foreign-flag vessels in the territorial waters of the

United States, to inspect such vessels at any time, to place guards thereon, and, if necessary in his opinion in order to secure such vessels from damage or injury, or to prevent damage or injury to any harbor or waters of the United States, or to secure the observance of rights and obligations of the United States, may take for such purposes full possession and control of such vessels and remove therefrom the officers and crew thereof, and all other persons not especially authorized by him to go or remain on board thereof;

(b) to safeguard against destruction, loss, or injury from sabotage or other subversive acts, accidents, or other causes of similar nature, vessels, harbors, ports, and waterfront facilities in the United States, the Canal Zone, and all territory and water, continental or insular, subject to the jurisdiction of the United States. Any appropriation available to any of the Executive Departments shall be available to carry out the provisions of this chapter. June 15, 1917, c. 30, Title II, §1, 40 Stat. 220; Aug. 9, 1950, c. 656, §1, 64 Stat. 427; Sept. 26, 1950, c. 1049, §2(b), 64 Stat. 1038.

EXECUTIVE ORDER 10173

REGULATIONS RELATING TO THE SAFEGUARDING OF VESSELS, HARBORS, PORTS, AND WATERFRONT FACILITIES OF THE UNITED STATES

By virtue of the authority vested in me by Public Law 679, 81st Congress, 2d Session, approved August 9, 1950, which amended section 1, Title II of the act of June 15, 1917, 40 Stat. 220 (50 U.S.C. 191), and as President of the United States, I hereby find that the security of the United States is endangered by reason of subversive activity, and I hereby prescribe the following regulations relating to the safeguarding against destruction, loss, or injury from sabotage or other subversive acts, accidents, or other causes of similar nature, of vessels, harbors, ports, and waterfront facilities in the United States, and all territory and water, continental or insular, subject to the juris-

diction of the United States, exclusive of the Canal Zone, and the said regulations shall constitute Part 6, Subchapter A, Chapter I, Title 33 of the Code of Federal Regulations; and all agencies and authorities of the Government of the United States shall, and all state and local authorities and all persons are urged to, support, conform to, and assist in the enforcement of these regulations and all supplemental regulations issued pursuant thereto:

• • •

[Text of regulations omitted—codified, presently applicable provisions of 33 C.F.R. Part 6 appear below, pp. A-4 to A-10.]

HARRY S. TRUMAN

THE WHITE HOUSE
October 18, 1950

EXECUTIVE ORDER 10277

AMENDING REGULATIONS RELATING TO THE SAFEGUARDING OF VESSELS, HARBORS, PORTS, AND WATERFRONT FACILITIES OF THE UNITED STATES

By virtue of the authority vested in me by Public Law 679, 81st Congress, 2d Session, approved August 9, 1950, which amended section 1, Title II of the act of June 15, 1917, 40 Stat. 220 (50 U.S.C. 191), and as President of the United States, I hereby prescribe the following amendments of the regulations prescribed by Executive Order 10173 of October 18, 1950, which regulations constitute Part 6, Subchapter A, Chapter I, Title 33 of the Code of Federal Regulations:

• • •

[Text of regulations omitted—codified, presently applicable provisions of 33 C.F.R. Part 6 appear below, pp. A-4 to A-10.]

HARRY S. TRUMAN

THE WHITE HOUSE
August 1, 1951

EXECUTIVE ORDER 10352

AMENDMENT OF THE REGULATIONS RELATING TO THE SAFEGUARDING OF VESSELS, HARBORS, PORTS, AND WATERFRONT FACILITIES OF THE UNITED STATES

By virtue of the authority vested in me by the act of August 9, 1950, 64 Stat. 427, which amended section 1, Title II of the act of June 15, 1917, 40 Stat. 220 (50 U.S.C. 191), and as President of the United States, I hereby prescribe the following amendment of the regulations prescribed by Executive Order No. 10173 of October 18, 1950, as amended by Executive Order No. 10277 of August 1, 1951, which regulations constitute Part 6, Subchapter A, Chapter I, Title 33 of the Code of Federal Regulations:

* * *

[Text of regulations omitted—codified, presently provisions of 33 C.F.R. Part 6 appear below, pp. A-4 to A-10.]

HARRY S. TRUMAN

THE WHITE HOUSE
May 19, 1952

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33 C.F.R. PART 6—PROTECTION AND SECURITY OF VESSELS, HARBORS, AND WATERFRONT FACILITIES

Subpart 6.01—Definitions

Sec.

6.01-1 Commandant.
6.01-2 District Commander.
6.01-3 Captain of the Port.
6.01-4 Waterfront facility.
6.01-5 Security zone.

Subpart 6.04—General Provisions

6.04-1 Enforcement.
6.04-5 Preventing access of persons, articles or things to vessels, or waterfront facilities.
6.04-6 Establishing security zones; prohibitions with respect thereto.
6.04-7 Visitation, search, and removal.
6.04-8 Possession and control of vessels.
6.04-11 Assistance of other agencies.

Subpart 6.10—Identification and Exclusion of Persons From Vessels and Waterfront Facilities

6.10-1 Issuance of documents and employment of persons aboard vessels.
6.10-3 Special validation of merchant marine documents.
6.10-5 Access to vessels and waterfront facilities.
6.10-7 Identification credentials.
6.10-9 Appeals.

Subpart 6.12—Supervision and Control of Explosives and Other Dangerous Cargo

6.12-1 General supervision and control.
6.12-3 Approval of facility for dangerous cargo.

Subpart 6.14—Security of Waterfront Facilities and Vessels in Port

6.14-1 Safety measures.
6.14-2 Condition of waterfront facility a danger to vessel.

Subpart 6.16—Sabotage and Subversive Activity

6.16-1 Reporting of sabotage and subversive activity.
6.16-3 Precautions against sabotage.

Subpart 6.18—Penalties

Sec.
6.18-1 Violations.

Subpart 6.19—Responsibility for Security of Vessels and Waterfront Facilities

6.19-1 Primary responsibility.

AUTHORITY: The provisions of this Part 6 issued under 40 Stat. 220, as amended; 50 U.S.C. 191.

SOURCE: The provisions of this Part 6 contained in Executive Order 10173, 15 F.R. 7012, Oct. 20, 1950, unless otherwise noted.

CROSS REFERENCE: For regulations implementing the general enforcement provisions contained in Subparts 6.01—Definitions and 6.04—General Provisions, see Part 124 of this chapter.

Subpart 6.01—Definitions

§6.01-1 Commandant.

"Commandant" as used in this part, means the Commandant of the United States Coast Guard.

§6.01-2 District Commander.

"District Commander" as used in this part, means the officer of the Coast Guard designated by the Commandant to command a Coast Guard District.

§6.01-3 Captain of the Port.

"Captain of the Port" as used in this part, means the officer of the Coast Guard, under the command of a District Commander, so designated by the Commandant for the purpose of giving im-

mediate direction to Coast Guard law enforcement activities within his assigned area. In addition, the District Commander shall be Captain of the Port with respect to remaining areas in his District not assigned to officers designated by the Commandant as Captain of the Port.

[E.O. 11249, 30 F.R. 13001, Oct. 13, 1965]

§6.01-4 Waterfront facility.

"Waterfront facility" as used in this part, means all piers, wharves, docks, and similar structures to which vessels may be secured; areas of land, water, or land and water under and in immediate proximity to them; buildings on such structures or contiguous to them and equipment and materials on such structures or in such buildings.

[E.O. 11249, 30 F.R. 13001, Oct. 13, 1965]

§6.01-5 Security zone.

"Security zone" as used in this part, means all areas of land, water, or land and water, which are so designated by the Captain of the Port for such time as he deems necessary to prevent damage or injury to any vessel or waterfront facility, to safeguard ports, harbors, territories, or waters of the United States or to secure the observance of the rights and obligations of the United States.

[E.O. 11249, 30 F.R. 13001, Oct. 13, 1965]

Subpart 6.04—General Provisions

§6.04-1 Enforcement.

(a) The rules and regulations in this part shall be enforced by the captain of the port under the supervision and general direction of the District Commander and the Commandant, and all authority and power vested in the captain of the port by the regulations in this part shall be deemed vested in and may be exercised by the District Commander and the Commandant.

(b) The rules and regulations in this part may be enforced by any other officer of the Coast Guard designated by the Commandant or the District Commander.

[E.O. 10173, 15 F.R. 7012, Oct. 20, 1950, as amended by E.O. 10277, 16 F.R. 7541, Aug. 2, 1951]

§6.04-5 Preventing access of persons, articles or things to vessels, or waterfront facilities.

The Captain of the Port may prevent any person, article, or thing from boarding or being taken or placed on board any vessel or entering or being taken into or upon or placed in or upon any waterfront facility whenever it appears to him that such action is necessary in order to secure such vessel from damage or injury or to prevent damage or injury to any vessel, or waterfront facility or waters of the United States, or to secure the observance of rights and obligations of the United States.

[E.O. 11249, 30 F.R. 13001, Oct. 13, 1965]

§6.04-6 Establishing security zones; prohibitions with respect thereto.

The Captain of a Port may establish security zones subject to the terms and conditions specified in §6.01-5. No person or vessel shall enter a security zone without the permission of the Captain of the Port. No person shall board or take place any article or thing on board any vessel in a security zone without the permission of the Captain of the Port. No person shall take or place any article or thing upon any waterfront facility in any such zone without such permission.

[E.O. 11249, 30 F.R. 13001, Oct. 13, 1965]

§6.04-7 Visitation, search, and removal.

The Captain of the Port may cause to be inspected and searched at any time any vessel, waterfront facility, or security zone, or any person, article, or thing thereon or therein, within the jurisdiction of the United States, may place guards upon any such vessel, waterfront facility, or security zone and may remove therefrom any and all persons, articles, or things not specifically authorized by him to go or remain thereon or therein.

[E.O. 11249, 30 F.R. 13002, Oct. 13, 1965]

§6.04-8 Possession and control of vessels.

The captain of the port may supervise and control the movement of any vessel and shall take full or partial possession or control of any vessel or any part thereof, within the territorial waters of the United States under his jurisdiction, whenever it appears to him that such action is necessary in order to secure such vessel from damage or injury, or to prevent damage or injury to any vessel or waterfront facility or waters of the United States, or to secure the observance of rights and obligations of the United States.

§6.04-11 Assistance of other agencies.

The captain of the port may enlist the aid and cooperation of Federal, State, county, municipal, and private agencies to assist in the enforcement of regulations issued pursuant to this part.

Subpart 6.10—Identification and Exclusion of Persons From Vessels and Waterfront Facilities

§6.10-1 Issuance of documents and employment of persons aboard vessels.

No person shall be issued a document required for employment on a merchant vessel of the United States nor shall any person be employed on a merchant vessel of the United States unless the Commandant is satisfied that the character and habits of life of such person are such as to authorize the belief that the presence of the individual on board would not be inimical to the security of the United States: *Provided,* That the Commandant may designate categories of merchant vessels to which the foregoing shall not apply.

[E.O. 10352, 17 F.R. 4624, May 21, 1952]

§6.10-3 Special validation of merchant marine documents.

The Commandant may require that all licensed officers and certificated men who are employed on other than the exempted designated categories of merchant vessels of the United States be holders of specially validated documents. The form of such documents, the conditions, and the manner of their issuance shall be as prescribed by the Commandant. The Commandant shall revoke and require the surrender of a specially validated document when he is no longer satisfied that the holder is entitled thereto.

§6.10-5 Access to vessels and waterfront facilities.

Any person on board any vessel or any person seeking access to any vessel or any waterfront facility within the jurisdiction of the United States may be required to carry identification credentials issued by or otherwise satisfactory to the Commandant. The Commandant may define and designate those categories of vessels and areas of the waterfront wherein such credentials are required.

§6.10-7 Identification credentials.

The identification credential to be issued by the Commandant shall be known as the Coast Guard Port Security Card, and the form of such credential, and the conditions and the manner of its issuance shall be as prescribed by the Commandant after consultation with the Secretary of Labor. The Commandant shall not issue a Coast Guard Port Security Card unless he is satisfied that the character and habits of life of the applicant therefor are such as to authorize the belief that the presence of such individual on board a vessel or within a waterfront facility would not be inimical to the security of the United States. The Commandant shall revoke and require the surrender of a Coast Guard Port Security Card when he is no longer satisfied that the holder is entitled thereto. The Commandant may recognize for the same purpose such other credentials as he may designate in lieu of the Coast Guard Port Security Card.

[E.O. 10277, 16 F.R. 7541, Aug. 2, 1951]

§6.10-9 Appeals.

Persons who are refused employment or who are refused the issuance of documents or who are required to surrender such documents, under this subpart, shall have the right of appeal, and the Commandant shall appoint Boards for acting on such appeals. Each such Board shall, so far as practicable, be composed of one Coast Guard officer, one member drawn from management, and one member drawn from labor. The members drawn from management and labor shall, upon suitable security clearance, be nominated by the Secretary of Labor. Such members shall be deemed to be employees of the United States and shall be entitled to compensation under the provisions of section 15 of the act of August 2, 1946 (5 U.S.C. 55a) while performing duties incident to such employment. The Board shall consider each appeal brought before it and, in recommending final action to the Com-

mandant, shall insure the appellant all fairness consistent with the safeguarding of the national security.

Subpart 6.12—Supervision and Control of Explosives or Other Dangerous Cargo

§6.12-1 General supervision and control.

The captain of the port may supervise and control the transportation, handling, loading, discharging, stowage, or storage of explosives, inflammable or combustible liquids in bulk, or other dangerous articles or cargo covered by the regulations entitled "Explosives or Other Dangerous Articles on Board Vessels" (46 C.F.R. Part 146) and the regulations governing tank vessels (46 C.F.R. Parts 30 to 39, inclusive).

§6.12-3 Approval of facility for dangerous cargo.

The Commandant may designate waterfront facilities for the handling and storage of, and for vessel loading and discharging, explosives, inflammable or combustible liquids in bulk, or other dangerous articles or cargo covered by the regulations referred to in §6.12.-1, and may require the owners, operators, masters, and others concerned to secure permits for such handling, storage, loading, and unloading from the captain of the port, conditioned upon the fulfillment of such requirements for the safeguarding of such waterfront facilities and vessels as the Commandant may prescribe.

Subpart 6.14—Security of Waterfront Facilities and Vessels in Port

§6.14-1 Safety measures.

The Commandant, in order to achieve the purposes of this part, may prescribe such conditions and restrictions relating to the safety of waterfront facilities and vessels in port as he finds to be necessary under existing circumstances. Such conditions and restrictions may extend, but shall not be limited to, the inspection, operation, maintenance, guarding, and manning of, and fire-prevention measures for, such vessels and waterfront facilities.

[E.O. 10277, 16 F.R. 7541, Aug. 2, 1951]

§6.14-2 Condition of waterfront facility a danger to vessel.

Whenever the captain of the port finds that the mooring of any vessel to a wharf, dock, pier, or other waterfront structure would endanger such vessel, or any other vessel, or the harbor or any facility therein by reason of conditions existing on or about such wharf, dock, pier, or other waterfront structure, including, but not limited to, inadequate guard service, insufficient lighting, fire hazards, inadequate fire protection, unsafe machinery, internal disturbance, or unsatisfactory operation, the captain of the port may prevent the mooring of any vessel to such wharf, dock, pier, or other waterfront structure until the unsatisfactory condition or conditions so found are corrected, and he may, for the same reasons, after any vessel has been moored, compel the shifting of

such vessel from any such wharf, dock, pier, or other waterfront structure.

[E.O. 10277, 16 F.R. 7541, Aug. 2, 1951]

Subpart 6.16—Sabotage and Subversive Activity

§6.16-1 Reporting of sabotage and subversive activity.

Evidence of sabotage or subversive activity involving or endangering any vessel, harbor, port, or waterfront facility shall be reported immediately to the Federal Bureau of Investigation and to the captain of the port, or to their respective representatives.

§6.16-3 Precautions against sabotage.

The master, owner, agent, or operator of a vessel or waterfront facility shall take all necessary precautions to protect the vessel, waterfront facility, and cargo from sabotage.

Subpart 6.18—Penalties

§6.18-1 Violations.

Section 2, Title II of the act of June 15, 1917, as amended, 50 U.S.C. 192, provides as follows:

If any owner, agent, master, officer, or person in charge, or any member of the crew of any such vessel fails to comply with any regulation or rule issued or order given under the provisions of this title, or obstructs or interferes with the exercise of any power conferred by this title, the vessel, together with her tackle, apparel, furniture, and equipment, shall be subject to seizure and forfeiture to the United States in the same manner as merchandise is forfeited for violation of the customs revenue laws; and the person guilty of such failure, obstruction, or interference shall be punished by imprisonment for not more than ten years and may, in the discretion of the court, be fined not more than $10,000.

(a) If any other person knowingly fails to comply with any regulation or rule issued or order given under the provisions of this title, or knowingly obstructs or interferes with the exercise of any power conferred by this title, he shall be punished by imprisonment for not more than ten years and may, at the discretion of the court, be fined not more than $10,000.

Subpart 6.19—Responsibility for Security of Vessels and Waterfront Facilities

§6.19-1 Primary responsibility.

Nothing contained in this part shall be construed as relieving the masters, owners, operators, and agents of vessels or other waterfront facilities from their primary responsibility for the protection and security of such vessels or waterfront facilities.

[E.O. 10277, 16 F.R. 7541, Aug. 2, 1951]

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33 C.F.R. PART 121—SPECIAL VALIDATION ENDORSEMENT FOR EMERGENCY SERVICE FOR MERCHANT MARINE PERSONNEL

Sec.

121.01 Requirements for special validation endorsement.
121.03 Standards.
121.05 Applications.
121.07 Approval of applicant by Commandant.
121.09 Holders of special validation endorsement.
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121.19 Hearing procedure.
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121.23 Appeals.
121.25 Action by Commandant after appeal.
121.27 Outstanding endorsements and applications.
121.29 Applications previously denied.

AUTHORITY: The provisions of this Part 121 issued under R.S. 4517, 4518, secs. 2, 19, 23 Stat. 58, 118, sec. 7, 49 Stat. 1936, sec. 2, 40 Stat. 220; 46 U.S.C. 570-572, 2, 689, 50 U.S.C. 191, E.O. 10173, 15 F.R. 7005. 3 C.F.R., 1950 Supp., E.O. 10277, 16 F.R. 7537, 3 C.F.R., 1951 Supp., E.O. 10352, 17 F.R. 4607, 3 C.F.R. 1952 Supp.

SOURCE: The provisions of this Part 121 contained in C.G.F.R. 56-12, 21 F.R. 2814, May 1, 1956, unless otherwise noted.

§121.01 Requirements for special validation endorsement.

(a) Except as otherwise provided in this section no person shall be employed on a merchant vessel of the United States of 100 gross tons or over unless he is in possession of a Merchant Mariner's document bearing a special validation endorsement for emergency service.

(b) The vessels described in paragraph (a) of this section include those at anchor or made fast to a dock, but not those laid up or dismantled or out of commission.

(c) By "employed" and "employment" is meant the engagement of any person to fill any licensed or certificated berth on board ship whether or not under articles and includes those engaged for standby, relief, or other capacities.

(d) The following terms and conditions shall apply with respect to the employment of any person as a replacement or addition in the crew of any vessel described in paragraph (a) of this section at foreign ports when persons in possession of documents bearing a special validation endorsement for emergency service are not available as established to the satisfaction of the United States consular representative of the area:

(1) A person in possession of a United States seaman's document not bearing a special validation endorsement for emergency service may be employed only after approval of the Commandant is obtained by the United States consular representative for the area or by the master of the vessel.

(2) A person who is a United States citizen and who is not in possession of a United States seaman's document may be employed if no person specified in subparagraph (1) of this paragraph is available as established to the satisfaction of the United States consular representative for the area, and then only after approval of the Commandant is obtained by the United States consular representative for the area or by the master of the vessel.

(3) A person who is not a citizen of the United States and who is not in possession of a United States seaman's document may be employed only if no person as specified in subparagraphs (1) and (2) of this paragraph is available as established to the satisfaction of the United States consular representative for the area and then only after the following terms and conditions are met:

(i) No such person shall be employed unless he presents evidence of temporary clearance from the United States consular representative for the area;

(ii) In no case shall the number of such persons employed on any one vessel exceed ten (10) percent of the total complement of the vessel, unless it is established to the satisfaction of the United States consular representative for the area that it is necessary to exceed this percentage to avoid delay to the sailing of the vessel or that the employment of persons with special qualifications as additional crew members is necessary in the vessel's operations; and

(iii) No such person shall be employed to fill the berth of a licensed officer or registered staff officer, except that if no radio officer is available as established to the satisfaction of the United States consular representative for the area, a person may be employed as radio operator in accordance with the provisions of Article 24, section 2, of the International Telecommunications Convention (Atlantic City, 1947), which reads as follows:

2. (1) In the case of complete unavailability of the operator in the course of a sea passage, a flight or a journey, the master or the person responsible for the station may authorize, solely as a temporary measure, an operator holding a certificate issued by the government of another country member of the Union [Footnote: The term "Union" means those countries which are parties to the International Telecommunications Convention] to perform the radio communication service.

(2) When it is necessary to employ as a temporary operator a person without a certificate or an operator not holding an adequate certificate, his performance as such must be limited solely to

signals of distress, urgency and safety, messages relating thereto, messages relating directly to the safety of life, urgent messages relating to movement of the ship and essential messages relating to the navigation and safe movement of the aircraft. Persons employed in these cases are bound by the provisions of 508 regarding the secrecy of correspondence.

(3) In all cases, such temporary operators must be replaced as soon as possible by operators holding the certificate prescribed in Sec. 1 of this article.

§121.03 Standards.

Information concerning an applicant for special validation endorsement for emergency service, or a holder of such endorsement, which may preclude a determination that his character and habits of life are such as to warrant the belief that his presence on board vessels of the United States would not be inimical to the security of the United States, shall relate to the following:

(a) Advocacy of the overthrow or alteration of the Government of the United States by unconstitutional means.

(b) Commission of, or attempts or preparations to commit, an act of espionage, sabotage, sedition or treason, or conspiring with, or aiding or abetting another to commit such an act.

(c) Performing, or attempting to perform, duties or otherwise acting so as to serve the interests of another government to the detriment of the United States.

(d) Deliberate unauthorized disclosure of classified defense information.

(e) Membership in, or affiliation or sympathetic association with, any foreign or domestic organization, association, movement, group, or combination of persons designated by the Attorney General pursuant to Executive Order 10450, as amended.

§121.05 Applications.

(a) Any person legally holding a current valid license or certificate, or an applicant for such a document, may make application at any Coast Guard Marine Inspection Office for a special validation endorsement for emergency service.

(b) Each Marine Inspection Office shall forward promptly to the Commandant each application for a special validation endorsement received by it.

(c) (1) Application for special validation endorsement shall be made under oath in writing and shall include applicant's answers in full to inquiries with respect to such matters as are deemed by the Commandant to be pertinent to the standards set forth in §121.03, and to be necessary for a determination whether the character and habits of life of the applicant are such as to warrant

the belief that his presence on board vessels of the United States would not be inimical to the security of the United States.

(2) If an applicant fails or refuses to furnish the required information or fails or refuses to make full and complete answer with respect to all matters of inquiry, the Commandant shall hold in abeyance further consideration of the application, and shall notify the applicant that further action will not be taken unless and until the applicant furnishes the required information and fully and completely answers all inquiries directed to him.

(d) (1) If, in the judgment of the Commandant, an application does not contain sufficient information to enable him to satisfy himself that the character and habits of life of the applicant are such as to warrant the belief that his presence on board vessels of the United States would not be inimical to the security of the United States, the Commandant may require the applicant to furnish, under oath in writing or orally, such further information as he deems pertinent to the standards set forth in §121.03 and necessary to enable him to make such a determination.

(2) If an applicant fails or refuses to furnish such additional information, the Commandant shall hold in abeyance further consideration of the application, and shall notify the applicant that further action will not be taken unless and until the applicant furnishes such information.

(e) Upon receipt, the application and such further information as the Commandant may have required shall be referred, except in those instances where action on an application is held in abeyance pursuant to paragraphs (c)(2) or (d)(2) of this section, to a committee composed of a representative of the Legal Division, of the Merchant Vessel Personnel Division, and of the Intelligence Division, Coast Guard Headquarters. The committee shall prepare an analysis of the available information and shall make recommendations for action by the Commandant.
[CGFR 59–63, 25 F.R. 1588, Feb. 24, 1960]

§121.07 Approval of applicant by Commandant.

(a) If the Commandant is satisfied that the character and habits of life of the applicant are such as to warrant the belief that his presence on board vessels of the United States would not be inimical to the security of the United States, he will direct that a special validation endorsement be entered on the applicant's Merchant Mariner's Document.

(b) If the Commandant is not satisfied that the character and habits of life of the applicant are such as to warrant the belief that his presence on board vessels of the United States would not be inimical to the security of the United States, he will notify the applicant in writing as provided for in §121.11.

§121.09 Holders of special validation endorsement.

(a) Whenever the Commandant is not satisfied that the character

and habits of life of a holder of a document bearing a special validation endorsement are such as to warrant the belief that his presence on board vessels of the United States would not be inimical to the security of the United States, he will request the holder to furnish under oath in writing such information as he deems pertinent to the standards set forth in §121.03 and necessary for a determination on this issue.

(b) If the holder fails or refuses to furnish such information within thirty (30) days after receipt of the Commandant's request, the Commandant may issue the written notice provided for in §121.11(a).

(c) The holder's failure or refusal to furnish such information shall preclude a determination that the holder's character and habits of life are such as to warrant the belief that his presence on board vessels of the United States would not be inimical to the security of the United States.

(d) Upon receipt of such information as the Commandant may have required, the procedure prescribed in §121.05(e) shall be followed.

(e) If the Commandant is satisfied that the character and habits of life of the holder are such as to warrant the belief that his presence on board vessels of the United States would not be inimical to the security of the United States, he shall notify the holder accordingly.

(f) If the Commandant is not satisfied that the character and habits of life of the holder are such as to warrant the belief that his presence on board vessels of the United States would not be inimical to the security of the United States, he shall notify the holder in writing as provided for in §121.11.

[CGFR 59–63, 25 F.R. 1589, Feb. 24, 1960]

§121.11 Notice by Commandant.

(a) The notice provided for in §§121.07 and 121.09 shall contain a statement of the reasons why the Commandant is not satisfied that the character and habits of life of the applicant or holder are such as to warrant the belief that his presence on board vessels of the United States would not be inimical to the security of the United States. Such notice shall be as specific and detailed as the interests of national security shall permit and shall include pertinent information such as names, dates, and places in such detail as to permit reasonable answer.

(b) The applicant or holder shall have 20 days from the date of receipt of the notice of reasons to file written answer thereto. Such answer may include statements or affidavits by third parties or such other documents or evidence as the applicant or holder deems pertinent to the matters in question.

(c) Upon receipt of such answer the procedure prescribed in §121.05(e) shall be followed.

(d) If the Commandant is satisfied that the character and habits of life of the applicant or holder are such as to warrant the belief that his presence on board vessels of the United States would not be inimical to the security of the United States, he shall, in the case of an applicant, direct that a special validation endorsement be entered on his Merchant Mariner's Document or, in the case of a holder, notify him accordingly.

(e) If the Commandant is not satisfied that the applicant's or holder's character and habits of life are such as to warrant the belief that his presence on board vessels of the United States would not be inimical to the security of the United States, the Commandant shall refer the matter to a Hearing Board for hearing and recommendation in accordance with the provisions of this part.

§121.13 Hearing Boards.

The Commandant may establish a Hearing Board in each Coast Guard District. The Commandant shall designate for each Hearing Board a Chairman, who shall be, so far as practicable, an officer of the Coast Guard. The Commandant shall designate, so far as practicable, a second member from a panel of persons representing labor named by the Secretary of Labor, and a third member from a panel of persons representing management named by the Secretary of Labor.

§121.15 Notice by Hearing Board.

Whenever the Commandant refers a matter to a Hearing Board, the Chairman shall:

(a) Fix the time and place of the hearing;

(b) Inform the applicant or holder of the names of the members of the Hearing Board, their occupations, and the businesses or organizations with which they are affiliated, of his privilege of challenge, and of the time and place of the hearing.

(c) Inform the applicant or holder of his privilege to appear before the Hearing Board in person or by counsel or representative of his choice, and to present testimonial and documentary evidence in his behalf, and to cross-examine any witnesses appearing before the Board; and

(d) Inform the applicant or holder that if within 10 days after receipt of the notice he does not request an opportunity to appear before the Hearing Board, either in person or by counsel or representative, the Hearing Board will proceed without further notice to him.

§121.17 Challenges.

Within five days after receipt of the notice described in §121.15 the applicant or holder may request disqualification of any member

of the Hearing Board on the grounds of personal bias or other cause. The request shall be accompanied by an affidavit setting forth in detail the facts alleged to constitute grounds for disqualification. The affidavit may be supplemented by an oral presentation if desired. If after due consideration the Chairman believes a challenged member is qualified notwithstanding the challenge, he shall notify the person who made the challenge and arrange to proceed with the hearing. If the person who made the challenge takes exception to the ruling of the Chairman, the exception and data relating to the claim of disqualification shall be made a matter of record. If the Chairman finds that there is reasonable ground for disqualification he shall furnish the person who made the challenge with the name of an alternate in lieu of the challenged member and arrange to proceed with the hearing. In the event the Chairman is challenged, he shall forthwith notify the Commandant, furnishing the grounds for the claim of disqualification, and the Commandant shall act upon the challenge in accordance with the foregoing procedure. In addition to the right of challenge for cause, a person who has requested a hearing shall have two peremptory challenges, one challenge for the management member and one challenge for the labor member of the Hearing Board. Should the management member be so challenged, the person who made the challenge may elect to have the management member replaced by another management member or by a member not representing either management or labor; if the member peremptorily challenged represents labor, the person who made the challenge may elect to have the labor member replaced by another labor member or by a member not representing either management or labor.

§121.19 Hearing procedure.

(a) Hearing shall be conducted in an orderly manner and in a serious, business-like atmosphere of dignity and decorum and shall be expedited as much as possible.

(b) The hearing shall be in open or closed session at the option of the applicant or holder.

(c) Testimony before the Hearing Board shall be given under oath or affirmation.

(d) The Chairman of the Hearing Board shall inform the applicant or holder of his right to:

(1) Participate in the hearing;

(2) Be represented by counsel of his choice;

(3) Present witnesses and offer other evidence in his own behalf and in refutation of the reasons set forth in the Notice of the Commandant; and

(4) Cross-examine any witnesses offered in support of such reasons.

(e) Hearings shall be opened by the reading of the Notice of the

Commandant and the answer thereto. Any statement and affidavits filed by the applicant or holder may be incorporated in the record by reference.

(f) The Hearing Board may, in its discretion, invite any person to appear at the hearing and testify. However, the Board shall not be bound by the testimony of such witness by reason of having called him and shall have full right to cross-examine the witness. Every effort should be made to produce material witnesses to testify in support of the reasons set forth in the Notice of the Commandant, in order that such witnesses may be confronted and cross-examined by the applicant or holder.

(g) The applicant or holder may introduce such evidence as may be relevant and pertinent. Rules of evidence shall not be binding on the Hearing Board, but reasonable restrictions may be imposed as to the relevancy, competency and materiality of matters considered. If the applicant or holder is, or may be, handicapped by the non-disclosure to him of confidential sources, or by the failure of witnesses to appear, the Hearing Board shall take the fact into consideration.

(h) The applicant or holder or his counsel or representative shall have the right to control the sequence of witnesses called by him.

(i) The Hearing Board shall give due consideration to documentary evidence developed by investigation, including membership cards, petitions bearing the applicant's or holder's signature, books, treatises or articles written by the applicant or holder and testimony by the applicant or holder before duly constituted authority.

(j) Complete verbatim stenographic transcription shall be made of the hearing by qualified reporters and the transcript shall constitute a permanent part of the record. Upon request, the applicant or holder or his counsel or representative shall be furnished, without cost, a copy of the transcript of the hearing.

(k) The Board shall reach its conclusion and base its determination on information presented at the hearing, together with such other information as may have been developed through investigations and inquiries or made available by the applicant or holder.

(l) If the applicant or holder fails, without good cause shown to the satisfaction of the chairman, to appear personally or to be represented before the Hearing Board, the Board shall proceed with consideration of the matter.

(m) The recommendation of the Hearing Board shall be in writing and shall be signed by all members of the Board. The Board shall forward to the Commandant, with its recommendation, a memorandum of reasons in support thereof. Should any member be in disagreement with the majority a dissent should be noted setting forth the reasons therefor. The recommendation of the Board, together with the complete record of the case, shall be sent to the Commandant as expeditiously as possible.

§121.21 Action by Commandant.

(a) If, upon receipt of the Board's recommendation, the Commandant is satisfied that the character and habits of life of the applicant or holder are such as to warrant the belief that his presence on board vessels of the United States would not be inimical to the security of the United States, he shall, in the case of an applicant, direct that a special validation endorsement be entered on his Merchant Mariner's Document, or, in the case of a holder, notify him accordingly.

(b) If, upon receipt of the Board's recommendation, the Commandant is not satisfied that the character and habits of life of the applicant or holder are such as to warrant the belief that his presence on board vessels of the United States would not be inimical to the security of the United States, the Commandant shall:

(1) In the case of an applicant for special validation endorsement, notify him of the Commandant's refusal to enter such endorsement;

(2) In the case of an applicant for a Merchant Mariner's Document, notify him of the Commandant's refusal to issue such document; or

(3) In the case of a holder, revoke and require the surrender of his special validation endorsement.

(c) Such applicant or holder shall be notified of his right, and shall have 20 days from the receipt of such notice within which, to appeal under this part.

§121.23 Appeals.

(a) The Commandant shall establish at Coast Guard Headquarters, Washington, D.C., an Appeal Board to hear appeals provided for in this part. The Commandant shall designate for the Appeal Board a Chairman, who shall be, so far as practicable, an officer of the Coast Guard. The Commandant shall designate, so far as practicable, a member from a panel of persons representing management nominated by the Secretary of Labor, and a member from a panel of persons representing labor nominated by the Secretary of Labor. The Commandant shall insure that persons designated as Appeal Board members have suitable security clearance. The Chairman of the Appeal Board shall make all arrangements incident to the business of the Appeal Board.

(b) If an applicant or holder appeals to the Appeal Board within 20 days after receipt of notice of his right to appeal under this part, his appeal shall be handled under the same procedure as that specified in §121.15 and the privilege of challenge may be exercised through the same procedure as that specified in §121.17.

(c) Appeal Board proceedings shall be conducted in the same manner as that specified in §121.19.

§121.25 Action by Commandant after appeal.

(a) If, upon receipt of the Appeal Board's recommendation, the Commandant is satisfied that the character and habits of life of the applicant or holder are such as to warrant the belief that his presence on board vessels of the United States would not be inimical to the security of the United States, he shall, in the case of an applicant, direct that a special validation endorsement be entered on his Merchant Mariner's Document, or, in the case of a holder, notify him accordingly.

(b) If, upon receipt of the Appeal Board's recommendation, the Commandant is not satisfied that the character and habits of life of the applicant or holder are such as to warrant the belief that his presence on board vessels of the United States would not be inimical to the security of the United States, the Commandant shall notify the applicant or holder that his appeal is denied.

§121.27 Outstanding endorsements and applications.

(a) All special validation endorsements for emergency service entered upon Merchant Mariner's Documents will be accepted as valid until cancelled, revoked, or suspended by proper authority.

(b) A person who has filed an application for a Merchant Mariner's Document bearing a special validation endorsement for emergency service and who has not received such an endorsement prior to May 1, 1956, shall submit a new application in accordance with the requirements of this part.

§121.29 Applications previously denied.

A person who has been denied a Merchant Mariner's Document bearing a special validation endorsement for emergency service, before May 1, 1956, may file a new application for such an endorsement in accordance with the requirements of this part.

U.S. CONSTITUTION

Article I, Section 9, Clause 3

No Bill of Attainder or ex post facto law shall be passed.

Amendment I

Congress shall make no law *** abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Amendment V

No person *** shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law ***.

Amendment VI

In all criminal prosecutions, the accused shall enjoy the right ••• to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defence.